TIM DOE #1 ET AL. *v.* SAINT FRANCIS HOSPITAL AND MEDICAL CENTER ET AL.
(SC 18912)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and Harper, Js.*

Argued April 26, 2012—officially released July 16, 2013

Michael P. Shea, with whom were *John W. Cerreta*, pro hac vice, and, on the brief, *Ernest J. Mattei*, *James H. Rotondo*, and *Paul D. Williams*, for the appellant

(named defendant).

Stephen D. Ecker, with whom were *Douglas Mahoney* and, on the brief, *M. Caitlin S. Anderson*, for the appellee (named plaintiff).

Opinion

PALMER, J. Beginning in 1964, and continuing for decades, George E. Reardon, a physician, purported to conduct a "child growth study" under the auspices and on the premises of his employer, the named defendant, Saint Francis Hospital and Medical Center (hospital). The ostensible purpose of the study was to measure the growth rates of normal children to assist in the treatment of children with abnormally low rates of growth. In fact, Reardon was a pedophile and child pornographer who used the so-called study as a ruse to recruit and sexually exploit hundreds of unsuspecting children. The named plaintiff, Tim Doe #1 (plaintiff),[1] was one of those children. He brought this action against the hospital alleging, first, that the hospital negligently had failed to supervise Reardon's activities in connection with the study and, second, that the hospital had breached the special duty of care that it owes to children in its custody.[2] Following a trial, the jury found for the plaintiff on both claims and awarded him $2,750,000. The trial court rendered judgment in accordance with the jury verdict, and, on appeal,[3] the hospital raises three claims of instructional impropriety. Specifically, the hospital claims that the trial court improperly (1) failed to instruct the jury that it could not hold the hospital liable for Reardon's criminal acts unless it first found that the hospital knew or should have known of Reardon's propensity to sexually abuse children, (2) failed to instruct the jury that the hospital's bylaws do not themselves establish the standard of care, and (3) instructed the jury on the issue of custody in connection with the plaintiff's claim that the hospital breached its special duty of care. We reject these claims and, accordingly, affirm the judgment of the trial court.

The following facts were adduced at trial and are essentially undisputed. The hospital hired Reardon in 1964 as a physician specializing in endocrinology. Immediately upon assuming that position, Reardon began conducting a child growth study out of his office on the hospital's fourth floor. The study was approved by the hospital's research committee and was funded by the Saint Francis Hospital Association, which awarded Reardon several $750 stipends. According to hospital records, Reardon used this money, as well as money from the hospital's "Endocrinology Research and Education Fund," to purchase large quantities of film, film processing materials, lenses, lighting equipment, an expensive movie camera, two books on erotica and another book entitled "The Juvenile Homosexual Experience and Its Effect on Adult Sexuality."

The stated purpose of the study was to collect and analyze data on growth and maturation patterns in healthy children. Unbeknownst to the hospital, however, Reardon's real purpose in establishing and conducting the study was to create a situation in which he

could be alone with children so that he could exploit them sexually. Over the course of the study, unwitting parents would drop their children off at the hospital, usually after school, but also on weekends, believing that the children were participating in legitimate medical research. By 1969, several hundred children, including the plaintiff, had participated in the study.

That year, the plaintiff, who was eight years old, and his ten year old sister were recruited for the study by Harold Scully, a family friend and physician at the hospital. The plaintiff's mother thought that participation in the study would be a good experience for her children, who were healthy and had no medical reason to see an endocrinologist, and would help instill in them the value of helping others. She never was informed, however, that, as part of the study, Reardon would be taking explicit photographs of her children and measuring their genitalia. It was her understanding, rather, that Reardon simply would be measuring their limbs and wingspan.[4] The first time that she brought the children to Reardon's office, Reardon informed her that his work with them would take time and that she should return in two hours to pick them up. After she left, Reardon led the plaintiff and his sister into an inner office, where he had them undress. Reardon then positioned the plaintiff's sister on the floor and instructed the plaintiff to open her vagina and then her anus with his hand while Reardon took photographs.

The plaintiff saw Reardon three additional times between 1969 and 1972. The second visit was similar to the first, with Reardon photographing the plaintiff and his sister in sexually explicit poses. The third visit occurred in 1971, while the plaintiff was being treated at the hospital for rheumatic fever. Although Reardon was not the plaintiff's physician, the plaintiff recalls that Reardon came to his hospital room and, after talking to a nurse, directed an orderly to take the plaintiff to Reardon's office. The plaintiff has no memory of what transpired at the office, nor is there any indication in the plaintiff's hospital records that Reardon removed the plaintiff from his hospital room at any point in time. The fourth visit occurred in 1972, when the plaintiff was twelve years old. On that occasion, the plaintiff went to Reardon's office without his sister. When he arrived, another boy was there. Reardon took both boys into an examination room where he had them undress. Reardon then masturbated the plaintiff and put his mouth over the plaintiff's penis for approximately one minute. He also measured the plaintiff's penis with a metal instrument. The plaintiff was mortified by the experience and never saw Reardon again. For the next thirty-five years, neither the plaintiff nor his sister told their parents about what Reardon had done to them.

The plaintiff's experience was by no means unique. William Roe,[5] another one of Reardon's victims, testified

at trial that, in 1967, when he was twelve years old, he and his three brothers were asked to participate in the growth study. He recalls that, on one occasion, his mother dropped him and his brothers off at the hospital. Over the course of several hours, Reardon called each boy into an office, which was set up like a photography studio. When it was Roe's turn, Reardon told him to undress and informed him that "part of the study was to excite [him] to measure [his] growth." Reardon then fondled Roe's penis until he ejaculated. Later, Reardon photographed all of the boys together, in groups and in pairs.

Another victim, Kevin Hunt,[6] testified that he was recruited by Reardon to participate in the study in 1970, when he was thirteen years old. Hunt recalled being dropped off at the hospital by his mother. Reardon met him and another boy in the lobby and then escorted them both to his office. For five or six hours, Reardon took photographs of the two boys in various positions. Among other positions, Reardon directed the boys to drape themselves around one another and to engage in simulated sex acts. Reardon also manually manipulated Hunt's penis. When he was done, Reardon drove the boys home. On the way, he stopped at a store and bought each boy a model car.

In 2007, nearly a decade after Reardon's death, the owner of Reardon's former residence discovered, behind a false wall in the basement, between 50,000 and 60,000 photographic slides and 130 films, all containing child pornography. Many of the sexually explicit slides and films depicted children who had been recruited to participate in Reardon's purported growth study. Some of the sexually explicit images were of the plaintiff and his sister.

Thereafter, approximately 140 individuals filed negligence actions against the hospital seeking damages for the sexual abuse to which Reardon subjected them as participants in the growth study.[7] Four individuals, including the plaintiff, were selected to participate in an initial consolidated trial. The trial court subsequently granted the hospital's motion to sever the cases. The plaintiff's case was tried first, and, at the conclusion of the evidence, the jury returned a verdict for the plaintiff in the amount of $2,750,000. This appeal followed.

The hospital raises three claims on appeal, all of which pertain to the trial court's jury instructions. The hospital's first two claims concern the propriety of the trial court's refusal to instruct the jury as the hospital had requested. Specifically, the hospital contends that the trial court improperly denied its requests to charge, first, that the jury could not find the hospital liable for Reardon's misconduct unless it found that the hospital had actual or constructive knowledge that Reardon was a pedophile and, second, that the hospital's bylaws do not themselves establish the standard of care. The hos-

pital also maintains, with respect to the plaintiff's claim that the hospital breached a special duty of care, that the trial court improperly instructed the jury on the issue of custody. We address, and reject, each of these claims in turn.

Before doing so, however, it is useful to clarify what the hospital does *not* claim on appeal. The hospital does not contend that the plaintiff's evidence was insufficient with respect to any element of either of the plaintiff's two claims of negligence. Thus, the hospital does not claim, under either count of the plaintiff's complaint, that the plaintiff failed to establish that the hospital owed a duty to the plaintiff, that the hospital breached that duty, or that its breach was a proximate cause of the harm that the plaintiff suffered as a result of Reardon's sexual misconduct. In particular, the hospital does not claim that the evidence adduced by the plaintiff was inadequate to prove either that Reardon's misconduct was foreseeable or that the hospital negligently failed to take reasonable precautions to prevent that misconduct. Consequently, we have no occasion to consider whether the evidence in the present case was sufficient to support the jury verdict; because the hospital has not challenged that verdict on sufficiency grounds, it would be improper for us to second-guess the jury's factual findings.[8] Finally, with the exception of the three discrete claims of instructional impropriety that we have identified, the hospital does not contend that the court's jury instructions were otherwise incomplete, inadequate or misleading. We now address the hospital's three claims.

I

We first consider the hospital's claim that the trial court improperly denied its request to instruct the jury that, to prove that the hospital had a duty to anticipate and take precautions to prevent Reardon's misconduct, the plaintiff was required to establish that the hospital knew or had reason to know of Reardon's propensity to sexually abuse children. In accordance with this instruction, the jury could not return a verdict for the plaintiff unless he established, as a predicate to liability, that the hospital had actual or constructive knowledge of Reardon's pedophilia. In support of this claim, the hospital maintains that, as a matter of law, a defendant may be found liable for damages resulting from the criminal acts of a third party *only* upon a showing that the defendant knew or had reason to know of that third party's criminal propensities.[9] We are unpersuaded by the hospital's claim.

The following additional facts and procedural history are relevant to our resolution of this issue.[10] The plaintiff's final amended complaint contained two counts. In the first count, the plaintiff alleged that the hospital committed corporate negligence in that the hospital "allowed Reardon to conduct a [child] growth study

without establishing protocols, rules or guidelines" and "violated its own rules" by failing to "properly monitor and supervise Reardon" in connection with the growth study so as "to prevent injury to" the minor subjects of the study, including the plaintiff.[11] In count two, the plaintiff alleged that the hospital breached the special duty of care that a hospital owes to children entrusted to its custody.[12] With respect to both counts, the plaintiff claimed that the hospital's negligence "caused [him] to sustain bodily injury, emotional distress and an impairment of his ability to carry on and enjoy life's activities."

During the plaintiff's case-in-chief, the plaintiff's counsel presented the expert testimony of Arthur Sidney Shorr, a healthcare administration consultant and former hospital administrator. Shorr testified that, during the relevant time frame, the standard of care applicable to the hospital's supervision of research was reflected in the hospital's "Bylaws, Rules and Regulations of the Medical and Dental Staff" (bylaws), the 1969 version of which was entered into evidence. Section 13 of the bylaws, entitled "The Research Committee," provides in relevant part: "The duties of [the research] [c]ommittee shall be to receive and review proposals for research projects submitted by members of the [s]taff and to forward its recommendations to the [e]xecutive [c]ommittee. . . . The [research] [c]ommittee, under the direction of the [e]xecutive [c]ommittee and the [a]dministration, shall be responsible for supervision of the research space and facilities of the hospital. . . . The [research] [c]ommittee shall require and receive periodic reports of the progress of investigations which have been approved and initiated. On the basis of such reports, it shall recommend continuance or discontinuance. . . . [The research] [c]ommittee shall meet at least quarterly and shall submit recommendations, as indicated, to the [e]xecutive [c]ommittee and to the [a]dministration on matters relating to the general conduct of research in the hospital."

The plaintiff also introduced into evidence five other internal hospital documents relating to research. The first document contains the minutes of a December 14, 1960 meeting of the hospital's board of directors. Those minutes provide in relevant part: "The [r]esearch [c]ommittee of the [m]edical [s]taff is charged with the responsibility of reviewing and making recommendations on research proposals, following the progress of investigation[s] already initiated, and, in general, supervising the facilities for, and conduct of, research in the hospital. Our research program is still in its infancy, and the activities of the [research] [c]ommittee to date have been limited . . . ."

The second document, a letter dated June 2, 1961, from the research committee to the hospital's executive committee of the medical and surgical staff, provides in relevant part: "1. The charge to the [research] [c]om-

mittee was reviewed . . . and the following procedures were voted:

"(a) The [research] [c]ommittee will request progress reports at [six month] intervals from those conducting approved projects.

"(b) The [research] [c]ommittee will assign space in the new research laboratories on a yearly basis. [Reassignment] of the space will be considered on the basis of approved projects which show continuing progress as well as new projects submitted. . . ."

The third document is the charge to the research committee referenced in the June 2, 1961 letter to the executive committee. It provides in relevant part: "Responsibility of a Research Committee

"1. Review and take action on proposals for research submitted by members of the staff. Proposals not to be considered unless presented in detail including experience of investigator, objectives, methods to be used, length of project, possible results, costs—including space requirements, personnel, sources of available funds, etc.

"2. Forward results of such action and recommendation to the [e]xecutive [c]ommittee of the [s]taff.

* * *

"4. Require and receive periodic reports of the progress of investigations which have been approved and initiated. Recommend continuance or discontinuance.

"5. Submission of recommendations to the [e]xecutive [c]ommittee and the [a]dministration on matters relating to the general conduct of research in the hospital. . . ."

The fourth document is the October 25, 1966 annual report of the research committee to the medical staff. This document, which identifies completed, continuing and new research projects, provides in relevant part: "The [r]esearch [c]ommittee will meet at quarterly intervals, or as need demands, and significant findings will be reported to the [m]edical [s]taff at its regular meetings.

"Physicians contemplating any research projects are requested to contact this committee in accordance with the [b]ylaws. This will help to keep the [m]edical [s]taff informed of the research activities and to facilitate the acquisition of funds."

The plaintiff also introduced into evidence a document, signed by the hospital's chief administrator, entitled "Institutional Assurance on Investigations Involving Human Subjects Including Clinical Research." This document, which the United States Public Health Service (PHS) required all hospitals to endorse as a prerequisite to receiving federal research funding, provides in relevant part: "[The] [h]ospital . . . agrees with the principles of the [PHS] [p]olicy (identified as [p]olicy

and [p]rocedure [o]rder 129 dated July 1, 1966) with regard to investigations involving human subjects, including clinical research. This institution agrees that review independent of the investigator is necessary to safeguard the rights and welfare of human subjects of research investigations and assures [PHS] that it will establish and maintain advisory groups competent to review plans of investigation involving human subjects, prior to initiation of investigations, to [e]nsure adequate safeguard[s]. Group reviews and decisions will be carried out in reference to (1) the rights and welfare of the individuals involved, (2) the appropriateness of the methods used to obtain informed consent, and (3) the risks and potential medical benefits of the investigations.

"The institution also agrees to exercise surveillance of PHS-supported projects using human subjects for changes in protocol which may alter the investigational situation with regard to the criteria cited above. The institution further assures [PHS] that it will provide advice and consultation to investigators on matters of employing human subjects in investigation, and also that it will provide whatever professional attention or facilities may be required to safeguard the rights and welfare of human subjects involved in investigation. Records of group review and decision on the use of human subjects and of informed consent will be developed and kept by the institution.

"Attached as part of this statement are copies of [the] policy and procedure of this institution with regard to use of human subjects in investigation[s], as well as a description of the groups utilized to review projects for enforcement of these policies and the manner in which the institution will [as]sure itself that the advice of the committee of associates is followed."

Attached to the institutional assurance document were two appendices. The first is a general statement by the hospital adopting the ethical principles set forth in the Declaration of Helsinki regarding the use of human subjects in clinical research. In the statement, the hospital pledges, among other things, "to safeguard the rights and welfare of human subjects used in medical investigations . . . ."

The second is a research committee memorandum regarding committee oversight of investigations utilizing human subjects. The memorandum provides in relevant part: "In order to provide a basis for agreement between [the hospital] and certain granting agencies, the . . . [h]ospital [r]esearch [c]ommittee has been assigned the responsibility for providing formal review of investigations utilizing human subjects. . . .

"For investigations utilizing human volunteers, the [r]esearch [c]ommittee will review each research plan for agreement with [the] . . . [h]ospital and granting

agency policy and especially with regard to: (1) the rights and welfare of the individual or individuals involved, (2) the appropriateness of the methods used to secure informed consent, and (3) the risks and potential benefit of the investigation. This review will be provided prior to [the] inception of research. To initiate the review, the [research] [c]ommittee recommends the following procedure:

"Each investigator should describe in his research plan—

"1) the procedures he will follow to [en]sure the rights and welfare of the patient and to secure and document informed consent,

"2) the nature of the professional attention and facilities he will provide, and

"3) the risks and potential medical benefits of the investigations proposed."

Shorr was asked to explain the significance of each of these documents, which he did primarily by reading aloud from the documents or restating them in his own words. Shorr also testified that, on the basis of his review of the facts and circumstances surrounding Reardon's growth study, and contrary to the criteria set forth in the various documents, he "did [not] see any indication that anyone at [the] . . . [h]ospital ever once reviewed anything to do with . . . Reardon's growth study while it was ongoing . . . ."

The plaintiff also presented the testimony of Maria New, a pediatric endocrinologist and professor of pediatrics at Mount Sinai School of Medicine in New York.[13] New, who graduated from medical school in 1954, testified that the standard of care from 1969 to 1972 required that endocrinologists, when examining or photographing the genitals of a child, have a chaperone present in the room. New also stated that, in all her years of practicing pediatric endocrinology, she never had seen or heard of a physician photographing the genitals of a child without a parent being present, either in the room where the photographs were being taken or just outside the room. The purpose of the chaperone requirement, she explained, was to protect the privacy and safety of the children being photographed. New also testified that, during the relevant time frame, there was no medical or scientific need or reason for a study analyzing data on growth and maturation patterns of healthy children.

The hospital thereafter adduced testimony from Thomas Godar, a retired physician who served on the hospital's research committee from 1969 through the 1980s. Godar testified that the 1967 institutional assurance and the hospital's internal policies regarding research did not apply to observational research such as Reardon's growth study but, rather, only to clinical research in which invasive medical procedures were

performed. With respect to observational research, Godar stated that no oversight was required and none was undertaken. Nevertheless, on cross-examination, Godar acknowledged that, during his tenure as a member of the research committee, he was aware that Reardon was photographing and measuring the genitals of children as part of his growth study.

During closing arguments to the jury, the plaintiff's counsel maintained that the hospital was negligent in two ways. First, counsel argued that the hospital negligently had failed to follow its own rules relating to research conducted under the auspices of the hospital. More specifically, the plaintiff's counsel asserted that the jury need not rely on all of the so-called "warning signs," such as the books on erotica and the expensive film equipment that Reardon had purchased with hospital funds. Instead, he argued, the jury could rely solely on the fact that the hospital had failed to do what it was required to do with respect to the supervision of research conducted under its auspices. If the hospital had followed its own rules with respect to these requirements, counsel maintained, Reardon's study "never would have gotten off the ground," but, even if it had, it would have ended long before the plaintiff volunteered to participate in the study in 1969. Second, counsel asserted that the hospital was liable because of its failure to take reasonable precautions to protect the plaintiff when he was in its custody, both when the plaintiff was at the hospital participating in the growth study and when he was there being treated for rheumatic fever.[14]

In his closing remarks to the jury, counsel for the hospital argued that the plaintiff had not proven any of the elements of a negligence action. In particular, he argued that the plaintiff had presented no evidence that, during the relevant time frame, it was foreseeable that Reardon would sexually abuse children. In fact, he argued, the evidence was to the contrary.[15] Counsel also asserted that Shorr, the plaintiff's expert, had not testified credibly as to the standard of care applicable to the supervision of hospital research because Shorr never had served on a research committee and acknowledged that he knew nothing about research protocols. Finally, counsel for the hospital argued that, although Shorr testified that the hospital was obligated to supervise Reardon's research, Shorr had failed to explain what that supervision would have consisted of, and, therefore, it was impossible to determine whether, even if the hospital had done everything that Shorr claimed it was supposed to do, Reardon likely would have been prevented from sexually abusing the plaintiff.

After the parties' closing arguments, the trial court instructed the jury on the applicable legal principles. Prior thereto, the hospital had requested that the trial court instruct the jury that it was "the plaintiff's burden

to prove that [the hospital] owed a duty to the plaintiff to supervise . . . Reardon, who by law was required to be licensed by the state to practice medicine and was subject to oversight and supervision by the licensing authorities. In order to prove that [the hospital] owed [the plaintiff] such a duty, [he] must prove that the specific harm alleged . . . was foreseeable to [the hospital]. Specifically, the plaintiff must prove that [the hospital] had either actual or constructive notice that . . . Reardon had a propensity to sexually abuse children before the plaintiff was abused by [him]."

The trial court denied the hospital's request to charge and, after reviewing the allegations of the complaint with the jury,[16] instructed the jury in relevant part: "[T]he plaintiff has asserted several allegations in two separate counts of negligence. A cause of action for negligence has four elements: duty; breach of duty; causation; and damages. At this time, I want to instruct you on what negligence means. Negligence is the violation of [a] legal duty which one person owes to another to care for the safety of that person or that person's property. . . . [W]hen I use the term 'person' in these instructions, that includes a corporate entity such as [the hospital]. Under our common law, negligence is the failure to use reasonable care under the circumstances. Reasonable care is the care that a reasonably prudent person would have used in the same circumstances.

"In determining the care that a reasonably prudent person would use in the same circumstances, you should consider all of the circumstances which were known or should have been known to the [hospital] at the time of the conduct in question. Whether care is reasonable depends [on] the dangers that a reasonable person would perceive in those circumstances. It is common sense that the more dangerous the circumstance is, the great[er] the care that ought to be exercised.

"Now, a person is required to use greater care when the presence of children may be reasonably expected. The question is whether a reasonably prudent person in the [hospital's] position knowing what the [hospital] knew or should have known would anticipate that harm of the same general nature as that which occurred here was likely to result. In answering this question, you may take into account the tendency of children to disregard dangerous conditions.

"With regard to count two of the complaint, alleging a breach of the special duty owed to the plaintiff by the [hospital], you should note that, except in limited circumstances, a person has no duty to take actions in order to control the conduct of a third person to prevent harm to another person. One of the exceptions to this general rule is when there's a special relation between the actor and the other which gives a right to protection. In this case, there must be a special relation between

[the plaintiff] and [the hospital] in order for the exception to apply.

"The relation between a hospital and a child obligates the hospital to protect the child from harm, if you find that the hospital had custody of the child at the time that the harm occurred. To determine whether a custodial relationship existed, you must decide whether the plaintiff was deprived of his normal powers and/or opportunity of self-protection. This special duty is enhanced when the child is of tender years or otherwise incapable of managing his or her own affairs. . . . [I]n determining whether this special [duty] arose as alleged in count two, you should consider whether . . . Reardon, as an employee of the hospital, had custody of [the plaintiff] at any time while he was in his office or at the hospital.

"A duty to use [care] exists when a reasonable person, knowing what the [hospital] here either knew or should have known at the time of the alleged conduct, would foresee that harm of the same general nature as that which occurred here was likely to result from that conduct. If harm of the same general nature as that which occurred here was foreseeable, it does not matter if . . . the manner in which the harm . . . actually occurred was unusual, bizarre or unforeseeable."

Finally, the court instructed the jury: "[T]o prove that an injury is a reasonably foreseeable consequence of negligent conduct, a plaintiff need not prove that the [hospital] actually foresaw or should have foreseen the extent of the harm suffered or the manner in which it occurred. Instead, the plaintiff must prove that it is a harm of the same general nature as that which a reasonably prudent person in the [hospital's] position should have anticipated in view of what the [hospital] knew or should have known at the time of the negligent conduct.

"The [hospital] . . . claims that it was not foreseeable that . . . Reardon would harm [the plaintiff]. The plaintiff claims that harm of the same general nature as that which was allegedly sustained by the plaintiff was foreseeable."

After the jury returned its verdict for the plaintiff, the hospital filed a motion for a directed verdict[17] and to set aside the verdict, in which it claimed, inter alia, that, under settled law, it was under no duty to prevent Reardon from abusing the plaintiff sexually unless it knew or had reason to know of Reardon's propensity to inflict such abuse. The hospital further maintained that the trial court's refusal to instruct the jury on this legal principle entitled the hospital to a new trial. The plaintiff disputed this claim, arguing that the present case did not require evidence that the hospital had such prior knowledge of Reardon's propensity to abuse children because the plaintiff's theory of liability was predicated on his contention that, under the circum-

stances, the hospital's failure to supervise Reardon's activities gave rise to a risk of harm that was both foreseeable and unreasonable regardless of whether the hospital knew or should have known that Reardon was a pedophile. Following arguments on the hospital's motion, the trial court denied it.

On appeal, the hospital renews its claim that the trial court improperly declined to instruct the jury that it could find the hospital negligent only if it found that the hospital had actual or constructive knowledge of Reardon's propensity to sexually abuse children. In support of its claim, the hospital relies on the principle that there ordinarily is no duty to aid or protect another. Although the hospital acknowledges an exception to this general rule when a special relationship of custody or control exists between the parties such that imposition of a duty to protect is justified by considerations of public policy, it nevertheless maintains that the scope of that duty does not extend to protecting against the criminal misconduct of a third party unless the defendant knew or should have known of that third party's criminal propensity.[18] This is so, the hospital explains, because, in the absence of such actual or constructive knowledge, the third party's criminal misconduct is never foreseeable. The hospital further asserts that the trial court's failure to instruct the jury in accordance with this principle was harmful because the instruction was necessary to guide the jury in its consideration of the parties' claims with respect to the issues of duty and breach of duty.

The plaintiff contends that the trial court's instructions represented a correct statement of the law because there is no blanket or absolute rule of nonliability when the defendant lacks actual or constructive knowledge of a third party's propensity to engage in criminal conduct. The plaintiff maintains, rather, that, in all negligence actions, including those involving harm intentionally caused by third parties, whether the defendant owed a duty to the injured party turns on whether, as the trial court instructed the jury in the present case, a reasonably prudent person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that, as a result of the defendant's conduct, the injured party would suffer harm of the same general nature as that which occurred. The plaintiff further asserts that this is equally true whether the claim of negligence arises in the context of the special custodial relationship, which the plaintiff alleged in count two of his complaint, or whether, as the plaintiff alleged in count one of his complaint, the hospital's "failure to exercise reasonable care in connection with the growth study that [the hospital] authorized, sponsored and hosted" resulted in foreseeably harmful consequences to the plaintiff. Thus, with respect to both of his claims, the plaintiff explains that they are "based on allegations of negligence arising

from the fact that [the hospital] itself arranged a perfect situation for sexual exploitation by approving and funding a growth study in which it provided an employee with a private setting, bought him sophisticated photography equipment, and allowed him uncontrolled access to hundreds of young children knowing that he was photographing and handling their genitalia—all without any precautions whatsoever." (Emphasis omitted.)

For the reasons set forth more fully hereinafter, we reject the hospital's contention that the trial court improperly declined to charge the jury that it could not find the hospital negligent unless it found that the hospital knew or should have known that Reardon was a pedophile. It is true that, as a general matter, a defendant is not responsible for anticipating the intentional misconduct of a third party; see, e.g., 2 Restatement (Second), Torts § 302 B, comment (d), p. 89 (1965);[19] unless the defendant knows or has reason to know of the third party's criminal propensity. The criminal misconduct of a third party may be foreseeable under the facts of a particular case, however, without a showing that the defendant had such actual or constructive knowledge of the third party's criminal propensity. As this and many other courts have recognized, when a defendant's conduct creates or increases the risk of a particular harm and is a substantial factor in causing that harm, or when the defendant otherwise has a legally cognizable duty to aid or protect another person, the fact that the harm is brought about by the actions of a third party does not relieve the defendant of liability, *even though the third party's conduct is criminal*, if the harm that occurred is within the scope of the risk created by the defendant's conduct or reasonably could have been anticipated in light of the defendant's duty to protect. Thus, when the harm resulting from the criminal misconduct of a third party is foreseeable in view of the facts and circumstances presented, there is no reason why the injured party should nevertheless be required to establish that the defendant had actual or constructive knowledge of the third party's criminal propensity.

In other words, as the plaintiff aptly explains, proof of actual or constructive knowledge of propensity is but one way to establish that the criminal misconduct of the third party was foreseeable. Of course, evidence demonstrating such knowledge of the third party's criminal propensity will be the *only* way for the injured party to establish foreseeability in cases in which there is no other evidence from which the jury reasonably could find that the harm resulting from the third party's criminal misconduct should have been anticipated by the defendant. It also is true that those cases comprise the great majority of cases involving claims of a breach of duty by the defendant for failing to anticipate the criminal misconduct of a third party, whether that third party is the defendant's employee or someone else. But

when, as in the present case, there is no claim that the other, nonpropensity evidence was insufficient to support the claim that the criminal misconduct of the third party was foreseeable, it is improper to instruct the jury, as the hospital in the present case requested, that the injured party cannot prevail in the absence of proof that the defendant knew or should have known of the third party's criminal propensity. The reason for this conclusion is well-nigh self-evident: in the absence of proof of actual or constructive knowledge of propensity, such an instruction would foreclose the jury from returning a verdict for the plaintiff predicated on the other evidence adduced by the injured party on the issue of foreseeability.

The following principles guide our analysis of the hospital's claim. "The principal function of a jury charge is to assist the jury in applying the law correctly to the facts which [it] might find to be established . . . . The purpose of a request to charge is to inform the trial court of a party's claim of the applicable principle of law. . . . In determining whether a trial court improperly declined to instruct the jury in accordance with a party's request to charge, we review the evidence presented at trial in the light most favorable to supporting the . . . proposed charge. . . . A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given. . . . It follows from this principle, however, that a request to charge must be an accurate statement of the law . . . . Indeed, it is axiomatic that a trial court should not instruct the jury in accordance with a request to charge unless the proposed instruction is a correct statement of the governing legal principles." (Citations omitted; internal quotation marks omitted.) *Levesque* v. *Bristol Hospital, Inc.*, 286 Conn. 234, 247, 943 A.2d 430 (2008).

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . Duty is a legal conclusion about relationships between individuals, made after the fact, and [is] imperative to a negligence cause of action. . . . Thus, [t]here can be no actionable negligence . . . unless there exists a cognizable duty of care"; (citations omitted; internal quotation marks omitted) *Ryan Transportation, Inc.* v. *M & G Associates*, 266 Conn. 520, 525, 832 A.2d 1180 (2003); the scope of which we sometimes refer to as the standard of care. *Lepage* v. *Horne*, 262 Conn. 116, 123, 809 A.2d 505 (2002). "In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable [person] to protect them against an unreasonable risk of harm . . . arising out of the act." 2 Restatement (Second), supra, § 302, comment (a), p. 82. "[T]he test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the

defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." (Internal quotation marks omitted.) *Ryan Transportation, Inc.* v. *M & G Associates*, supra, 525–26. "With respect to the second inquiry, namely, the policy analysis, there generally is no duty that obligates one party to aid or to protect another party." Id., 526, citing 2 Restatement (Second), supra, § 314, p. 116 ("[t]he fact that the actor[20] realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action").

An exception to the general rule that one has no legal obligation to protect another may arise when the defendant's own conduct creates or increases the foreseeable risk that such other person will be harmed by the conduct of a third party, including the foreseeable criminal conduct of that third party. As we now discuss more fully, it is this exception, which is set forth in §§ 302 B and 449 of the Restatement (Second) of Torts,[21] and reflected in other related provisions of the Restatement (Second), that applies to the first count of the plaintiff's complaint alleging corporate negligence.

Section 302 B, entitled "Risk of Intentional or Criminal Conduct," provides that "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."[22] 2 Restatement (Second), supra, § 302 B, p. 88. Thus, "[i]f the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." Id., § 449, p. 482. In other words, as this court previously has explained in reliance on a closely related provision of the Restatement (Second) pertaining to legal causation, "[t]he actor's conduct may be negligent solely because he should have recognized that it would expose [another] person . . . to an unreasonable risk of criminal aggression. If so, it necessarily follows that the fact that the harm is done by such criminal aggression cannot relieve the actor from liability (see § 449 [of the Restatement (Second) of Torts]). [Moreover], it is not necessary that the conduct should be negligent solely because of its tendency to afford an opportunity for a third person to commit the crime. It is enough that the actor should have realized the likelihood that his conduct would create a temptation which would be likely to lead to its commission." (Internal quotation marks omitted.) *Stewart* v. *Federal*

Dept. Stores, Inc., 234 Conn. 597, 611–12 n.10, 662 A.2d 753 (1995), quoting 2 Restatement (Second), supra, § 448, comment (c), p. 482.[23]

This court has adhered to other provisions of the Restatement (Second) that are consistent with the negligence principles set forth in §§ 302 B and 449, including "the standard set forth in § [442 B] of the Restatement [Second], that [w]here the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person *and is not within the scope of the risk created by the actor's conduct.*"[24] (Emphasis added; internal quotation marks omitted.) *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 607–608, quoting 2 Restatement (Second), supra, § 442 B, p. 469; accord *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 124, 869 A.2d 179 (2005); *Merhi* v. *Becker*, 164 Conn. 516, 522, 325 A.2d 270 (1973). Under § 442 B, although a defendant is shielded from liability for the intentional misconduct of a third party outside the scope of the risk created by the defendant's conduct, even "[t]ortious or criminal acts may . . . be foreseeable, and so within the scope of the created risk . . . ." (Internal quotation marks omitted.) *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 611 n.10, quoting 2 Restatement (Second), supra, § 442 B, comment (c), p. 471. In such circumstances, when the harm caused by the criminal acts of a third party is a foreseeable consequence of the defendant's conduct and, therefore, within the scope of the risk created by the defendant's conduct, that conduct may be actionable. Section 448 of the Restatement (Second), which we applied in *Doe* v. *Manheimer*, 212 Conn. 748, 759 and n.5, 563 A.2d 699 (1989), overruled in part on other grounds by *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 597, also reflects this principle: "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless the actor at the time of his negligent conduct realized or should have realized . . . that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.*" (Emphasis added.) 2 Restatement (Second), supra, § 448, p. 480.[25]

More specifically, one of the comments to § 302 B of the Restatement (Second) further explains that "[t]here are . . . situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where . . . the actor's own affirmative act has created or exposed the other

to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account." Id., § 302 B, comment (e), p. 90. One situation in which the actor will be required to guard against the intentional misconduct of another is "[w]here the actor acts with knowledge of peculiar conditions which create a high degree of risk of [such] intentional misconduct."[26] Id., § 302 B, comment (e), example (H), p. 93. "It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence . . . it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it." Id., § 302 B, comment (f), p. 93.

Thus, for purposes of this exception, the issue is twofold: (1) whether the defendant's conduct gave rise to a foreseeable risk that the injured party would be harmed by the intentional misconduct of a third party; and (2) if so, whether, in light of that risk, the defendant failed to take appropriate precautions for the injured party's protection. As comment (f) to § 302 B of the Restatement (Second) of Torts makes clear, the issue necessarily is fact intensive, and its resolution will depend on the nature and gravity of the risk posed by the potential misconduct of the third party, with due regard, of course, for the vulnerability of the injured party.[27] See id. In other words, whether the injured party in any given case can satisfy the requirements of § 302 B *even though the defendant had no knowledge of the third party's criminal propensity* will hinge on a careful consideration of *all* of the nonexclusive factors set forth in comment (f) to § 302 B in light of the facts of the particular case.

A second exception to the general rule that a defendant has no obligation to aid or protect another person arises when "a special relation exists between the actor and the other which gives to the other a right of protection." Id., § 315 (b), p. 122.[28] Certain custodial relationships fall within this exception, which provides the basis for count two of the plaintiff's complaint. Under this exception, one who takes custody of another person may have a duty to protect that person from the intentional misconduct of a third person.[29] "One who . . . takes the custody of another under circumstances

such as to deprive the other of his normal power of self-protection . . . is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him . . . ." Id., § 320, p. 130.[30] In such cases, however, there is no duty to control the conduct of the third party unless, in light of the facts, the defendant "knows or should know of the necessity and opportunity for exercising such control." Id., § 320 (b), p. 130. This is so because, in the absence of facts from which the defendant reasonably could anticipate the need to control the conduct of the third party, there would be no justification for holding the defendant responsible for failing to take steps to prevent any harm inflicted on the plaintiff by the third party. Moreover, whether a duty of protection would extend to criminal misconduct by a third party in any given case will depend on whether, under all of the circumstances, the defendant had a sufficient basis for anticipating such criminal misconduct.[31]

An Appellate Court case, *Gutierrez* v. *Thorne*, 13 Conn. App. 493, 537 A.2d 527 (1988), aptly demonstrates how the criminal misconduct of a third party may be a foreseeable consequence of the manner in which the defendant conducts its activities, such that the defendant may be found civilly liable for the harm resulting from the third party's crime. In that case, the plaintiff, Stella Gutierrez, brought an action against the commissioner of mental retardation (commissioner) for injuries that Gutierrez had sustained when she was sexually assaulted by Steven Jones, an employee of the department of mental retardation (department), who was hired only after the department determined that he had no criminal record and no charges pending against him. Id., 497. Jones was assigned to supervise Gutierrez' living situation and, to that end, had been provided a key to her apartment by the department. See id. The trial court granted the commissioner's motion for summary judgment on the ground that no issue of material fact existed as to whether the commissioner owed a duty to Gutierrez because, as a matter of law, it was not reasonably foreseeable that Jones would sexually assault Gutierrez in her apartment. See id., 498.

In reversing the trial court's judgment, Judge (now retired Justice) Borden, writing for a unanimous Appellate Court panel, explained that "the question of foreseeability [was] not such as would lead to only one conclusion; rather, under the circumstances of [the] case, the foreseeability of whether the [commissioner's] conduct in permitting Jones to have a key to [Gutierrez'] apartment would result in a sexual assault . . . [was] a question to be resolved by the trier of fact." Id., 501. Judge Borden identified the various facts and circumstances on which the court relied in reaching this conclusion. "[Gutierrez] is a woman whose mental func-

tioning is slightly impaired. She is a client of the department . . . receiving the benefits of a state program to assist high-functioning mentally retarded persons in an independent living situation. The [department's] rules notwithstanding, the [commissioner], through department employees, permitted Jones, a male employee, to have complete, unfettered and unsupervised access to [Gutierrez'] apartment. [Gutierrez] was in a position [in which] it is unlikely that she could resist Jones' entry into her private apartment. This impaired ability to resist arose both from the unrestricted nature of the access granted to Jones by virtue of his possession of a key to [Gutierrez'] apartment, and from the particular vulnerability of [Gutierrez] due to the superior power accorded Jones in his relationship with [her] by virtue of their provider-client relationship, her mental impairment, and his ability to threaten a termination of her state [benefits]. Presented with these facts, the court [improperly granted the commissioner's motion for] summary judgment because the conclusion to be drawn from these facts as to whether it was reasonably foreseeable that [Gutierrez] would be sexually assaulted by the [commissioner's] employee is precisely the type of determination most appropriately left to the trier of fact."[32] Id., 501–502.

Thus, the Appellate Court concluded that, under the circumstances, Jones' conduct, although criminal, gave rise to a jury question as to whether that conduct was foreseeable, even though the commissioner neither knew nor had reason to know that Jones had a propensity for sexual violence. See id. In other words, the fact that the commissioner reasonably could not have known that Jones was prone to commit crimes of sexual violence did not relieve the commissioner of liability for the harm that Jones inflicted on Gutierrez if a jury were to find that Jones' conduct nevertheless was foreseeable under all of the circumstances. We fully agree with both the reasoning and result in *Gutierrez*,[33] the rationale of which has been applied by our trial courts in rejecting claims that a hospital cannot be found liable for its negligent supervision of an employee who assaults a patient unless the hospital knew or should have known of the employee's criminal propensities.[34]

Similarly, in the present case, whether it was reasonably foreseeable that the hospital's failure to supervise Reardon's growth study would result in the sexual abuse of the plaintiff, even though the hospital did not know or have reason to know of Reardon's pedophilia, presented a question of fact for the jury. As we indicated, the hospital has abandoned any claim that the jury reasonably could not have found that the plaintiff's injuries were a reasonably foreseeable consequence of the hospital's failure to supervise Reardon's activities. Indeed, on appeal, the hospital does not challenge the sufficiency of the evidence to support *any* of the jury's findings. That evidence established, among other facts,

that, for years, parents were persuaded to have their children participate in the growth study based in large part on the good name and reputation that the hospital enjoyed in the community. The hospital, however, exercised no supervision whatsoever over the study, even though it knew or should have known that Reardon was touching, photographing and filming the genitalia of naked children in his office, sometimes for hours, without a chaperone present and without any legitimate medical or scientific reason for conducting such a study in the first place. Although the hospital's expert, Godar, a member of the hospital's research committee during the relevant time frame, testified that Reardon's study was not the type of research that required supervision, the jury reasonably could have rejected this testimony as self-serving, especially in light of (1) Shorr's testimony that the hospital was, in fact, required to supervise Reardon's research, (2) the hospital's 1967 institutional assurance, in which the hospital had pledged to closely monitor "investigations involving human subjects" in order to safeguard the safety and welfare of the subjects, and (3) the testimony of New, a pediatric endocrinologist, that (a) there was no justification for the study, insofar as it involved healthy children, at the time period in question, and (b) measuring and photographing the genitalia of children are sufficiently invasive as to require the presence of a parent, or at least the parent's waiver of such presence. On the basis of this evidence, the plaintiff sought to persuade the jury, and did persuade the jury, that there was a foreseeable risk that the children who had been volunteered to participate in the study—children who, unbeknownst to their parents, were required to strip naked so that Reardon could physically examine, photograph and film their genitalia—would be sexually exploited or abused in some manner, such that the hospital was required to take at least *some* precautions to protect this highly vulnerable group of subjects.[35] Consequently, unless this evidence was insufficient as a matter of law to support a verdict for the plaintiff, an issue that, we reiterate, the hospital has elected not to pursue on appeal,[36] the plaintiff was entitled to a jury determination of whether, under all of the circumstances, the hospital's complete failure to supervise Reardon's activities exposed the plaintiff to an undue risk of sexual exploitation *even though* the hospital was unaware of Reardon's criminal propensities.

It therefore would have been improper for the trial court to instruct the jury in accordance with the hospital's request to charge that "the plaintiff must prove that [the hospital] had either actual or constructive notice that . . . Reardon had a propensity to sexually abuse children before the plaintiff was abused by [him]."[37] Such an instruction would have prevented the plaintiff from establishing the foreseeability of Reardon's sexual misconduct on the basis of the other evi-

dence of foreseeability on which the plaintiff had asked the jury to rely, and on which the jury did rely in reaching its verdict for the plaintiff.[38] Indeed, because the plaintiff's case was not predicated on proof that the hospital had actual or constructive knowledge of Reardon's pedophilia, the giving of the knowledge of propensity instruction sought by the hospital would have been akin to directing a verdict in the hospital's favor.[39] As we explained, this would have been improper because, in the absence of any claim of evidentiary insufficiency, it was for the jury to decide whether the harm that befell the plaintiff was foreseeable even though Reardon had no known propensity for pedophilia.[40] Accordingly, we reject the hospital's claim that the jury should have been instructed that it could find the hospital liable only if the plaintiff established that the hospital knew or should have known of Reardon's propensity to sexually abuse children.[41]

II

The hospital next claims that the trial court improperly failed to instruct the jury, pursuant to the hospital's request to charge, that the hospital's bylaws do not themselves establish the standard of care. The hospital further contends that the trial court's failure to instruct the jury in accordance with this principle was harmful because the plaintiff's expert, Shorr, repeatedly stated that the hospital's bylaws represented the standard of care, a point that the plaintiff's counsel emphasized forcefully during closing arguments.[42]

We disagree that the trial court was required to instruct the jury in accordance with the hospital's request. It is true that this court has stated that, "[a]lthough a violation of an employer's work rules can be viewed as evidence of negligence, such a violation does not establish the applicable duty of the hospital to its patients, since hospital rules, regulations and policies do not themselves establish the standard of care." (Internal quotation marks omitted.) *Petriello* v. *Kalman*, 215 Conn. 377, 386, 576 A.2d 474 (1990). We have articulated this general principle, however, only in cases in which there was no expert testimony that the hospital's bylaws, rules or regulations did coincide with the legally applicable standard of care in the relevant community.[43] See, e.g., id.; *Van Steensburg* v. *Lawrence & Memorial Hospitals*, 194 Conn. 500, 505–506, 481 A.2d 750 (1984); cf. *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 137, 998 A.2d 730 (2010). In the present case, by contrast, Shorr testified that the hospital's bylaws, which set forth certain requirements for the supervision of research studies, do represent the standard of care.[44] This testimony was bolstered by other documents that the plaintiff submitted as to research protocols. When, as in the present case, the plaintiff adduces otherwise admissible expert testimony that the institution's bylaws do, in fact, reflect

the standard of care, there simply is no need for the requested instruction.[45] Although the hospital has cited to no case, and we are aware of none, in which a court in this or any other jurisdiction has mandated such an instruction, we acknowledge that the instruction might be appropriate, if warranted by the facts and circumstances of a particular case, to dispel any suggestion that the jury may rely on the bylaws as establishing the standard of care *even in the absence of expert testimony* to that effect. Cf. *Buckley* v. *Lovallo*, 2 Conn. App. 579, 583 n.2, 481 A.2d 1286 (1984) (rejecting plaintiff's contention that she should have been allowed to introduce, inter alia, hospital's regulations to define applicable standard of care without supporting expert testimony). This, however, is not such a case.

Furthermore, the trial court provided the jury with a comprehensive instruction to guide its consideration of the testimony of the parties' expert witnesses.[46] Consequently, the jury was properly informed that it could accept Shorr's testimony or reject it in favor of the contrary expert testimony proffered by the hospital. Apparently, the jury credited Shorr's testimony, as it was entitled to do. We conclude, therefore, that the trial court properly denied the hospital's request to charge.

III

Finally, we address the hospital's claim that the trial court improperly instructed the jury that, in determining whether a custodial relationship existed between the hospital and the plaintiff, it could consider whether Reardon, as an employee of the hospital, had custody of the plaintiff at any time while the plaintiff was in Reardon's office or at the hospital. The hospital also contends that the trial court improperly invited the jury to decide the custody issue on the basis of facts that were irrelevant to that issue. Specifically, the hospital asserts that the trial court improperly informed the jury that it could consider the plaintiff's tender age, the tendency of children to disregard dangerous conditions and the testimony of two nonparty witnesses, Roe and Hunt, in determining whether the plaintiff was in the hospital's custody during the relevant time periods. We find no merit in these contentions.

Certain additional facts and procedural history are necessary to our review of the hospital's claims. In its preliminary instructions to the jury, the trial court advised the jury that the present case was somewhat unusual because, "in addition to [testimony from] the plaintiff, you will hear testimony from witnesses who have been given pseudonyms. They will testify about incidents that occurred between themselves and . . . Reardon, who is now deceased. . . . Reardon is not a party to this case and is not on trial.

"But the testimony and evidence presented through these witnesses is solely for the purpose of your consid-

eration of the issues of (1) whether the [hospital] was negligent in that it failed to monitor or supervise . . . Reardon's activities, and (2) whether [the hospital] owed and breached a special duty of care to [the plaintiff], who was a minor at the time . . . Reardon is alleged to have abused him."

Subsequently, in its final instructions to the jury, the trial court charged the jury in relevant part: "The relation between a hospital and a child obligates the hospital to protect the child from harm, if you find that the hospital had custody of the child at the time that the harm occurred. To determine whether a custodial relationship existed, you must decide whether the plaintiff was deprived of his normal powers and/or opportunity of self-protection. This special duty is enhanced when the child is of tender years or otherwise incapable of managing his or her own affairs. Now, in determining whether this special relationship arose as alleged in count two [of the plaintiff's complaint], you should consider whether . . . Reardon, as an employee of the hospital, had custody of [the plaintiff] at any time while he was in his office or at the hospital.

"A duty to use [care] exists when a reasonable person knowing what the [hospital] . . . either knew or should have known at the time of the alleged conduct would foresee that harm of the same general nature as that which occurred here was likely to result from that conduct. If harm of the same general nature as that which occurred here was foreseeable, it does not matter . . . if the manner in which the harm . . . actually occurred was unusual, bizarre or unforeseeable."

The hospital claims that the trial court improperly instructed the jury that, for purposes of determining whether the hospital voluntarily assumed custody of the plaintiff, it could consider whether Reardon, the hospital's employee, had custody of the plaintiff when the plaintiff was in Reardon's office or when the plaintiff was treated at the hospital for rheumatic fever. Notably, the hospital does not claim that the evidence was insufficient to support the jury's implicit finding that the plaintiff *was* in the hospital's custody on both occasions. Nor does the hospital dispute that a hospital necessarily exercises custody over patients *through its employees*. The hospital contends, rather, that the trial court's instruction "is impossible to square with the rule that an employee who commits a sexual assault at work does not act as his employer's agent or within the scope of his authority." We understand the hospital's argument to be that Reardon's criminal conduct extinguished the custodial relationship between the hospital and the plaintiff.

Not surprisingly, the hospital has identified no case or scholarly commentary to support its contention that Reardon's criminal acts operated to alter the custodial status between the hospital and the plaintiff. This

undoubtedly is because no such case or commentary exists. Indeed, one of the comments to § 314 A of the Restatement (Second) of Torts, which covers special relationships giving rise to a duty to aid or protect when an entity voluntarily takes custody of a child, notes that "[t]he duty to protect the [child] against unreasonable risk of harm extends to risks arising out of the [entity's] own conduct . . . [as well as] to risks arising . . . *from the acts of third persons*, *whether they be innocent*, *negligent*, *intentional*, *or even criminal*." (Emphasis added.) 2 Restatement (Second), supra, § 314 A, comment (d), p. 119. In light of the foregoing principle, the hospital's claim that Reardon's crimes severed the custodial relationship between the hospital and the plaintiff is unavailing.

The hospital's other claims are equally unpersuasive. Indeed, it is axiomatic that the plaintiff's tender years at the time of the abuse is relevant to a determination of whether he was "deprive[d] . . . of his normal opportunities for protection"; id., § 314 A (4), p. 118; when his mother left him alone with Reardon for hours at a time and when he was a patient at the hospital. See, e.g., *Murdock* v. *Croughwell*, 268 Conn. 559, 572, 848 A.2d 363 (2004) ("this court consistently has taken the position that children outside the supervision of their parents require special protection"); see also 2 Restatement (Second), supra, § 314 A (4), p. 118 ("[o]ne . . . who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a . . . duty to" protect him against unreasonable risk of physical harm). Furthermore, the testimony of Roe and Hunt also was relevant to this issue insofar as it buttressed the testimony of the plaintiff's mother regarding the length of time that the plaintiff was alone with Reardon and deprived of her supervision and protection. As we noted previously, the plaintiff's mother testified that the first time she brought the plaintiff to Reardon's office, he told her to return in two hours. Roe and Hunt testified to being left with Reardon for similarly extended periods of time when they participated in the growth study. Their testimony, therefore, was relevant to establish the extent to which Reardon exercised custody and control over the plaintiff and other minor subjects of the study, a fact that the hospital presumably would have known if it had exercised even a modicum of supervision over Reardon and his activities. The testimony also was relevant to the issue of whether the hospital voluntarily assumed custody of the plaintiff through the conduct of its employee, Reardon, when the plaintiff was left in Reardon's care for extended periods of time to participate in hospital sponsored research.

But even if the testimony of Roe and Hunt was not probative of these issues, the hospital has failed to identify any possible prejudice flowing from their testi-

mony except to assert that it could have "confounded the jury or encouraged it to substitute irrelevant evidence of nonparties' abuse for the required proof that [the hospital] voluntarily assumed custodial responsibility for [the plaintiff]." Although, ordinarily, a court might exclude the kind of testimony that Roe and Hunt had given as unduly prejudicial, Reardon's sexual abuse of children over a long period of time was undisputed. Consequently, no prejudice could have flowed from Roe's and Hunt's testimony regarding their own experiences with Reardon because the hospital has not challenged the plaintiff's allegations concerning the nature or manner of Reardon's misconduct. To the contrary, counsel for the hospital argued to the jury that Reardon was a master manipulator and predator who sexually abused children right under the hospital's nose, albeit without the hospital's knowledge, for years. The hospital therefore cannot prevail on its claims pertaining to the issue of custody.

The judgment is affirmed.

In this opinion ROGERS, C. J., and NORCOTT, EVELEIGH and HARPER, Js., concurred.

* This appeal originally was argued before a panel of this court consisting of Chief Justice Rogers, and Justices Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper. Justice McLachlan resigned from the judicial branch on October 1, 2012, and did not participate in the consideration or decision of this case.

The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] Tim Doe #1 is a pseudonym. We decline to identify the plaintiff in accordance with our policy of protecting the privacy interests of victims of sexual abuse. See General Statutes § 54-86e.

We note that there were additional parties named in this action who are not parties to this appeal. We refer only to the hospital and the plaintiff in this opinion.

[2] Reardon died in 1998. His estate is not a party to this action.

[3] The hospital appealed to the Appellate Court from the judgment of the trial court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[4] The plaintiff's mother never was asked to sign, and she never did sign, a consent form concerning the study.

[5] William Roe is a pseudonym. See footnote 1 of this opinion.

[6] At trial, Hunt did not object to being identified by his real name rather than by a pseudonym.

[7] The plaintiff commenced the present action in 2008, when he was forty-seven years old. See General Statutes § 52-577d (providing that action by individual alleging personal injury to minor caused by sexual abuse, sexual exploitation or sexual assault shall be commenced no later than thirty years from date such individual attains age of majority). The hospital raised a claim in the trial court challenging the applicability of § 52-577d to the present case. The trial court, however, rejected the hospital's claim, which the hospital has not renewed on appeal. It is undisputed that the present action was filed within the limitation period prescribed by § 52-577d.

[8] The hospital did raise several claims of evidentiary insufficiency in the trial court, including claims that the evidence failed to establish that Reardon's misconduct was foreseeable and that the hospital's alleged negligence was the proximate cause of the plaintiff's injuries. The hospital, however, has not renewed any of those claims on appeal. Having opted not to do so, the hospital has waived any claim that the evidence was insufficient to support the jury's verdict.

[9] It bears emphasis that the hospital did *not* request an instruction that its actual or constructive knowledge of Reardon's propensity for pedophilia was *one* relevant factor for the jury to consider in determining whether the hospital owed a duty to the plaintiff, and the hospital makes no such claim

on appeal. As we explain more fully hereinafter, if the hospital had requested an instruction that knowledge of propensity is a factor to consider, the trial court would have been obligated to give such an instruction because it is a correct statement of the law. Rather, the hospital maintained in the trial court, as it maintains on appeal, that knowledge of propensity was the *only* relevant factor for the jury to consider in deciding the threshold issue of duty. Thus, the hospital observes in its reply brief that its claim is a categorical one: "If the plaintiff cannot show that [the hospital] knew of or should have known about Reardon's propensity for sexual abuse, his claim fails and the case ends." The dissenting justice makes precisely the same claim, that is, in his view, an action against a defendant for negligently failing to supervise a third party who engages in criminal misconduct cannot succeed, no matter what the circumstances, unless the plaintiff establishes that the defendant knew or should have known of the third party's criminal propensities. As we explain more fully hereinafter, this is an incorrect statement of the law.

[10] We set forth the evidence adduced at trial in some detail only to provide context for our resolution of the hospital's claim of instructional impropriety, and not for purposes of considering the sufficiency of the evidence, an issue that, as we explained, is not before us.

[11] Specifically, the plaintiff alleged in count one of the complaint: "8. The injuries . . . suffered by the plaintiff [were] the proximate result of the foregoing breach of duties by the [hospital] . . . in one or more of the following ways:

"a. in that the hospital failed to properly monitor and supervise Reardon in order to prevent injury to minors such as the plaintiff;

"b. in that the hospital allowed Reardon to conduct a purported growth study of minors for the period of 1964 through 1972 without the establishment of protocols, rules, or guidelines or monitoring him in any way;

"c. in that the hospital violated its own rules and allowed Reardon to conduct a growth study without establishing protocols, rules, or guidelines or monitoring him in any way;

"d. in that the hospital failed to promulgate protocols, rules, or guidelines relative to doctors examining children alone in examination rooms; and/or

"e. in that the hospital failed to review and monitor the Reardon research that it funded, failed to implement safeguards to protect children, and failed to require preapproval of projects involving human subjects . . . ."

[12] Specifically, the plaintiff alleged in count two of the complaint: "1. At all times relevant to this action, the [hospital] . . . was and is a corporation organized and existing under the laws of the state of Connecticut and acted through its agents, servants, employees, and associated staff and physicians.

"2. At all times relevant to this action . . . Reardon . . . was a physician specializing in endocrinology and was in practice at, and employed by, the . . . hospital.

"3. Reardon served as the department chair and chief of endocrinology at the hospital. As such he managed the hospital's endocrinology department for children and adults.

"4. At all times relevant to this action, Reardon maintained his medical offices at [the hospital].

"5. At all times relevant to this action, [the hospital] knew that Reardon was providing treatment to minors such as the plaintiff on the premises of the hospital.

"6. At all times relevant to this action, [the hospital] was aware that Reardon was conducting a purported 'growth study' involving minors such as the [p]laintiff on the premises of the hospital.

"7. Some of the patients and study subjects were children that were admitted for overnight stays of one night [or] longer and were thus separated from their parents and guardians.

"8. The patients and study subjects were seen and studied by Reardon alone in his office and/or examining room and thus were separated from their parents and guardians, sometimes for extended periods of time.

"9. The patients and study subjects were in the custody of the hospital during their treatment or pretextual treatment by Reardon and/or participation in Reardon's purported 'growth study.'

"10. The plaintiff's parents or guardians entrusted their child to the hospital's custody when they admitted their child to the hospital or submitted him to Reardon for treatment and study evaluations.

"11. The general risk of harm, or injury of the type suffered by the plaintiff, was foreseeabl[e] by the hospital under the circumstances . . . .

"12. The injuries . . . suffered by the plaintiff were the proximate and foreseeable result of the foregoing breach of special duties owed to the

plaintiff by the [hospital] . . . acting through its officers, administrators, staff, employees, and committees, in that the hospital failed to act affirmatively and proactively to monitor and supervise Reardon in order to prevent injury to minors such as the plaintiff who was especially vulnerable."

[13] Mount Sinai School of Medicine is now known as the Icahn School of Medicine at Mount Sinai.

[14] With respect to the latter incident, the plaintiff's counsel observed that Reardon had taken the plaintiff from his hospital room even though the plaintiff was not his patient, the plaintiff's parents had not given Reardon permission to remove the plaintiff from his room and, in fact, they were unaware of Reardon's actions. The plaintiff's counsel noted, moreover, that, in contravention of hospital rules, there was no record in the plaintiff's medical chart that Reardon had taken the plaintiff from his hospital room. Counsel maintained that, under these circumstances, the jury reasonably could infer that Reardon had sexually exploited the plaintiff even though the plaintiff himself had no recollection of the incident.

[15] Counsel for the hospital observed that the only expert to testify regarding what people knew about pedophilia and child sex abuse during the relevant time frame, Anna Carol Salter, a clinical psychologist and expert on the subject of child abuse, stated that the issue "was not on [anyone's] radar" screen and, in fact, was not even taught when she was a doctoral student at Harvard University in the 1970s. Counsel also argued that, during the relevant time frame, Reardon was a highly respected physician who was on the staff of several hospitals and also an assistant professor of medicine at Yale University School of Medicine and an assistant clinical professor of endocrinology at the University of Connecticut School of Medicine. Finally, the hospital's counsel explained that Reardon was "a licensed professional who had taken the Hippocratic Oath to do no harm and to put the patients' interest[s] first. . . . [T]hat is a serious oath . . . [and] there was no indication he had [ever] violated [that] oath."

[16] Specifically the trial court instructed the jury: "To review the basic allegations of the complaint, members of the jury, the plaintiff . . . has alleged that, while a minor, he was injured due to the negligence of [the hospital] between the years of 1969 and 1972. The plaintiff bases his claims on two different counts of negligence. In the first count, the plaintiff contends that [the hospital] was negligent in that (a) the hospital failed to properly monitor and supervise . . . Reardon, an employee of [the hospital], in order to prevent injury to minors, such as [the plaintiff], (b) the hospital allowed . . . Reardon to conduct a purported growth study of minors, such as [the plaintiff], for the period of 1969 through 1972 without the establishment of protocols, rules or guidelines, or monitoring him in any way, (c) the hospital violated its own rules and allowed . . . Reardon to conduct a growth study without establishing protocols, rules or guidelines, or monitoring him in any way, (d) the hospital failed to promulgate protocols, rules or guidelines relative to doctors examining minors, such as [the plaintiff], alone in examination rooms, and (e) the hospital failed to review and monitor . . . Reardon's research that it funded, failed to implement safeguards to protect children, and failed to require preapproval of projects involving human subjects.

"[In] his second count, the plaintiff alleges that [the hospital] was negligent in that it owes a special duty of care to [the plaintiff] and that it breached that duty. Specifically, he alleges that, acting through its officers, administrators, staff, employees and committees, the hospital failed to act affirmatively and proactively to monitor and supervise . . . Reardon in order to prevent the injury to minors, such as [the plaintiff].

"As to both counts, the plaintiff claims that, as a result of the negligence of [the hospital], the plaintiff has suffered emotional distress and an impairment of his ability to carry on and enjoy life's pleasures.

"Now, while the plaintiff's complaint alleges a number of specific ways in which the [hospital] was negligent, to prove negligence, it is not necessary for the plaintiff to prove that the [hospital] was negligent in all of the ways claimed. Proof that the [hospital] was negligent in just one of the ways claimed is sufficient to prove negligence."

[17] The hospital previously had filed a motion for a directed verdict after the plaintiff presented his case-in-chief, but the parties agreed to have the court defer its ruling on that motion until after the jury returned a verdict.

[18] As the hospital further acknowledges, the relationship between a possessor of land and a business invitee also may give rise to a duty of protection. See, e.g., *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 114, 122, 869 A.2d 179 (2005). Although both parties claim that this principle of

premises liability is consistent with their position, neither party contends that the present case is governed by that principle.

[19] Comment (d) to § 302 B provides: "Normally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law. Even where there is a recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of foreseeable harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it." 2 Restatement (Second), supra, § 302 B, comment (d), p. 89.

[20] The word "actor" is used throughout the Restatement (Second) of Torts "to designate either the person whose conduct is in question as subjecting him to liability toward another, or as precluding him from recovering against another whose tortious conduct is a legal cause of the actor's injury." 1 Restatement (Second), supra, § 3, p. 6. Hereinafter, we use the words "actor" and "defendant" interchangeably.

[21] Because §§ 302 B and 449 of the Restatement (Second) are closely related, the comments to § 449 expressly direct that that section is to be read in conjunction with § 302 B. See 2 Restatement (Second), supra, § 449, comment (a), p. 482 ("[t]his [s]ection should be read together with § 302 B, and the [c]omments to that [s]ection, which deal with the foreseeable likelihood of the intentional or even criminal misconduct of a third person as a hazard which makes the actor's conduct negligent").

[22] We note that § 302 B is a "special application" of the rule in clause (b) of § 302 of the Restatement (Second) of Torts. 2 Restatement (Second), supra, § 302 B, comment (a), p. 89.

Section 302, entitled "Risk of Direct or Indirect Harm," provides in relevant part: "A negligent act or omission may be one which involves an unreasonable risk of harm to another through . . .

"(b) the foreseeable action of the other, a third person, an animal, or a force of nature." Id., § 302, p. 82.

[23] Comment (c) to § 448 of the Restatement (Second) further provides that "[t]his is true although the likelihood that such a crime would be committed might not be of itself enough to make the actor's conduct negligent, and the negligent character of the act arises from the fact that it involves other risks which of themselves are enough to make it unreasonable, or from such risks together with the possibility of crime." 2 Restatement (Second), supra, § 448, comment (c), p. 482.

[24] In addition, "to be within the scope of the risk, the harm actually suffered must be of the same general type as that which makes the defendant's conduct negligent in the first instance. . . . Moreover, [i]f the . . . [defendant's] conduct is a substantial factor in bringing about harm to another, the fact that the . . . [defendant] neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent it from being liable." (Citation omitted; internal quotation marks omitted.) *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 609–10, quoting 2 Restatement (Second), supra, § 435 (1), p. 449.

[25] The hospital submitted a superseding cause instruction in accordance with § 448 and related provisions of the Restatement (Second) of Torts, as set forth in Connecticut Civil Jury Instruction 3.1-8, available at http://www.jud.ct.gov/JI/Civil/part3/3.1-8.htm (last visited June 4, 2013). For reasons that are not apparent from the record, the trial court did not give this requested instruction or any other similar or comparable instruction. The hospital, however, has not challenged on appeal the trial court's failure to charge the jury in accordance with its request.

[26] We recognize, of course, that the trial court did not instruct the jury in the language of the Restatement provisions on which we rely for purposes of our analysis of the hospital's claim. Indeed, neither party requested any such instruction. Rather, the court charged the jury in accordance with general negligence principles, without elaborating on any of the specific considerations that pertain to a claim of liability predicated on § 302 B of the Restatement (Second) of Torts. The hospital, however, does not take issue with the instructions as given, arguing only that the court should have supplemented those instructions as it had requested.

We also note that, on appeal, the parties make passing reference to several Restatement provisions but do not rely expressly on § 302 B. We do so, however, because the principles underlying § 302 B inform the arguments

that the parties make on appeal, and, further, those principles accurately reflect the state of the law with respect to the issues presented by this case.

[27] As we have noted; see footnote 22 of this opinion; § 302 of the Restatement (Second) of Torts is a general statement of the principles that are defined with greater specificity in § 302 B, and the comments to § 302, in particular, comment (d), are relevant to our analysis. Comment (d) announces the uncontroversial principle that "the actor as a reasonable man is required to know the habits and propensities of human beings" and "to anticipate" the "customary or normal" acts of others. 2 Restatement (Second), supra, § 302, comment (d), p. 83. That comment further provides that "[t]he actor is negligent if he intentionally creates a situation, or if his conduct involves a risk of creating a situation, which he should realize as likely to be dangerous to others in the event of such customary or normal act . . . ." Id. These statements are fully consistent with the more specific statements of comment (d) to § 302 B pertaining to intentional and criminal misconduct, which provides in relevant part: "Normally the actor has . . . less reason to anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case [the actor] may reasonably proceed upon the assumption that others will not [intentionally cause harm to another]. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law." Id., § 302 B, comment (d), p. 89. Thus, it is clear that, under these provisions, the actor *ordinarily* will not be required to anticipate the intentional or criminal misconduct of a third party. The drafters' use of the terms "[n]ormally" and "[i]n the ordinary case" also makes clear, however, that, sometimes, the actor *will* be required to anticipate and protect against the possible criminal misconduct of a third party. Id. One such case is when the actor knows or has reason to know of the third party's criminal propensity. As the Restatement (Second) also recognizes, there may be other situations in which, because of the actor's "knowledge of *peculiar conditions* which create a high degree of risk of intentional misconduct"; (emphasis added) id., § 302 B, comment (e), example (H), p. 93; the actor is obligated to take appropriate precautions against the risk created by those unusual conditions. In such circumstances, an instruction *requiring* proof of knowledge of propensity would be improper because the issue is not whether the actor knew or should have known of the third party's criminal propensity but, rather, whether the third party's criminal misconduct was foreseeable in light of the "peculiar conditions" of the particular case. Id. As we discuss hereinafter, in the present case, because the hospital has abandoned any claim of evidentiary insufficiency, the plaintiff was entitled to a jury determination as to whether the growth study and the manner in which it was conducted gave rise to "peculiar conditions" of the kind contemplated by example (H) in comment (e) to § 302 B. Id.

[28] Section 315 of the Restatement (Second), entitled "General Principle," provides: "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

"(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

"(b) a special relation exists between the actor and the other which gives to the other a right to protection." 2 Restatement (Second), supra, § 315, p. 122.

[29] As we have indicated, under § 315 of the Restatement (Second), an actor may have a duty to control the conduct of a third party so as to prevent him from causing harm to another if, in light of the special relationship between the actor and the third party, the actor has a duty to control the conduct of the third party. See Restatement (Second), supra, § 315 (a), p. 122. Thus, under § 317 of the Restatement (Second), in certain circumstances, an employer has a duty to exercise reasonable care to control his employee so as to prevent the employee from intentionally harming others. See id., § 317, p. 125 ("[a] master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others . . . if . . . [b] the master [i] knows or has reason to know that he has the ability to control his servant, and [ii] knows or should know of the necessity and opportunity for exercising such control"). Although it is undisputed that Reardon was an employee of the hospital, contrary to the claim of the dissenting justice, the plaintiff does not rely on the employer-employee relationship as the basis of the first count of his complaint. In contrast to the second count of the complaint, which is expressly predicated on the nature of the relationship between the

hospital and the plaintiff, the first count, which is captioned "[c]orporate [n]egligence," is predicated on general negligence principles, as set forth more particularly in § 302 B of the Restatement (Second), which are applicable when a defendant engages in conduct that creates an unreasonable risk of harm to another through the foreseeable criminal misconduct of a third party. Although Reardon's employment by the hospital was one fact for the jury to consider in resolving the plaintiff's claim under count one, the plaintiff did not rely on that relationship for purposes of establishing the hospital's duty to take reasonable precautions to protect him from the kind of sexual exploitation that he had suffered as a result of his participation in the growth study. Rather, the plaintiff maintained that, under the totality of the circumstances involving the hospital's sponsorship and promotion of the growth study, its failure to monitor the study was negligent and a proximate cause of the harm that he had suffered—*the very same claim that would have been available to the plaintiff whether Reardon had participated in the study as an employee, an independent contractor or merely as an unpaid volunteer*. As we explain more fully hereinafter, however, under the facts of the present case, there is no material difference in the proof necessary to establish liability under § 302 B or under § 317; thus, the plaintiff could have relied on § 317 for purposes of the first count of his complaint if he had elected to do so. See footnote 37 of this opinion.

[30] Section 320 of the Restatement (Second) provides: "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

"(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

"(b) knows or should know of the necessity and opportunity for exercising such control." 2 Restatement (Second), supra, § 320, p. 130.

[31] This latter determination is not materially different from the determination to be made under count one of the plaintiff's complaint, namely, whether, in light of the relevant facts and circumstances, the hospital should have anticipated the harm of the kind that the plaintiff suffered at the hands of Reardon and have taken reasonable precautions to prevent it. Although the dissenting justice contends that knowledge of propensity is required under both § 302 B and § 320 of the Restatement (Second), nothing in the language of either provision supports that assertion. On the contrary, the fact that the provisions and the comments to those sections contain no such language belies the dissenting justice's claim.

[32] The hospital contends that the court in *Gutierrez* simply "[failed] to mention" that Gutierrez also was required to prove that the commissioner had notice of Jones' criminal propensities and that, although the court did not "specifically discuss the notice of propensity rule," Connecticut courts "have not read the decision [in *Gutierrez*] to foreclose application of the notice of propensity standard" in the twenty-five years since *Gutierrez* was decided. In fact, Connecticut courts have not read *Gutierrez* either to foreclose a jury charge on the issue of knowledge of propensity in every case or to require such a charge in every case. See footnote 34 of this opinion (discussing Superior Court cases holding that proof of notice of propensity is not required under facts of this case). As *Gutierrez* indicates, whether such an instruction is appropriate depends on the particular facts of the case in light of the claims being asserted. In *Gutierrez*, the court determined that the evidence was sufficient to support a jury verdict in favor of Gutierrez on her claim that the commissioner was negligent in granting Jones access to her apartment, *even though the commissioner had no reason to know that Jones was prone to sexual violence*, because, in light of the relevant facts and circumstances, a jury reasonably could find that Jones' misconduct was a foreseeable consequence of the commissioner's decision to afford Jones unfettered access to Gutierrez' apartment. See *Gutierrez* v. *Thorne*, supra, 13 Conn. App. 500–502. The court underscored this point in explaining that it was reserving judgment as to whether the evidence supporting Gutierrez' other claims was sufficient to establish foreseeability for purposes of those claims. See id., 502 n.4.

[33] The dissenting justice expresses the view that *Gutierrez* is "irrelevant" to our resolution of the present case because *Gutierrez* (1) did not specifically address the question of "whether a jury instruction on [actual or constructive] knowledge of a third party's propensity to sexually abuse children was

required in order to hold the defendant liable," (2) came to the Appellate Court at a different stage of the case than the present case comes to this court, (3) is not binding on this court, and (4) "contains serious errors in its legal analysis that should not be implicitly endorsed by this court." Footnote 23 of the dissenting opinion. We disagree with the dissenting justice's critique of *Gutierrez*. With respect to the dissenting justice's first two claims, neither constitutes a valid basis for distinguishing *Gutierrez* from the present case because the principles at issue in the two cases are identical despite their different procedural postures. As we explained, the court in *Gutierrez* concluded that the jury was free to find the commissioner liable in that case *even though the commissioner had no reason to know that Jones, the department employee who sexually assaulted Gutierrez, had a propensity for sexual violence*. See *Gutierrez* v. *Thorne*, supra, 13 Conn. App. 500–502. That is *precisely* the issue raised by the present case: if, as the plaintiff claimed and the jury found, the evidence established that the hospital should have anticipated and guarded against Reardon's misconduct, then the knowledge of propensity instruction that the hospital requested—which would have foreclosed a verdict for the plaintiff because the plaintiff adduced no evidence of such knowledge—was incorrect as a matter of law. With respect to the dissenting justice's contention that the legal analysis of the court in *Gutierrez* "contains serious errors," we see nothing improper in the court's analysis. On the contrary, the Appellate Court reached the correct result following its proper application of settled negligence principles. Indeed, we believe that the soundness of the court's analysis in *Gutierrez* is readily discernible from our discussion of the case. Accordingly, although we agree, of course, that *Gutierrez* is not binding on this court, we, in contrast to the dissenting justice, consider it to be highly persuasive precedent because it is thoughtfully and persuasively reasoned. Indeed, the dissenting justice fails to explain why, on the facts of that case, Gutierrez was not entitled to a jury determination of whether the commissioner was negligent in permitting Jones unlimited and unsupervised access to Gutierrez' residence at any time.

[34] For example, in *Burban* v. *Hill Health Corp.*, Superior Court, judicial district of New Haven, Docket No. CV-01-0446764 (December 12, 2006) (*A. Robinson, J.*), the plaintiff, Jane Doe, was involuntarily admitted to a mental health facility owned and operated by the defendant, Hill Health Corporation (Hill Health), for treatment of various mental health issues. While a patient there, Doe was allegedly sexually assaulted by Moises Velez, a security guard employed by Hill Health. Id. Doe thereafter sought damages from Hill Health, alleging, inter alia, that her injuries were the result of Hill Health's negligent supervision of Velez. Id. Hill Health moved for summary judgment on the ground that there was no evidence to establish that it knew or had reason to know, based on Velez' background and history, that he might sexually assault a patient. See id. The trial court denied Hill Health's motion, explaining that, despite the absence of such evidence, the facts nevertheless were sufficient to permit a finding that Hill Health had been negligent in supervising Velez. See id. In reaching its determination, the court referred to evidence demonstrating that Hill Health did not have "adequate security staffing or an adequate security plan," that Doe was in a particularly "vulnerable and weak population group [that] required greater protection" than other patients, that she had been involuntarily committed to the custodial care of Hill Health, that Hill Health's security supervisor knew that "there was an increased risk of injury in the stairwell where the alleged assault took place," and that Doe was required to be "under the protection and care of male employees while wearing only hospital scrubs, with no undergarments." Id. Although the court observed that the fact that Hill Health had no reason to know of Velez' propensity for sexual violence was a factor for the jury to consider, it nevertheless concluded that the lack of such knowledge was not "on its own determinative of the issue" of foreseeability in light of the other evidence. Id.

The court employed the same analysis, and reached the same conclusion, in *DiTeresi* v. *Stamford Health System, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST-CV-06-5001340-S (November 21, 2012) (*Jennings, J.*). In that case, the plaintiff, Santina DiTeresi, then ninety-four years old and suffering from dementia, was admitted to Stamford Hospital for treatment of various ailments. Id. While a patient there, she was sexually assaulted by Robert E. Mayes, a certified nurse's assistant employed by the defendant, Stamford Health System, Inc. (Stamford Health). Id. DiTeresi's estate sought damages from Stamford Health and others, alleging, inter alia, that its negligent supervision of Mayes was a proximate cause of the sexual

assault. Id. In denying Stamford Health's motion for summary judgment predicated on the fact that there was no evidence to establish that it knew or should have known of Mayes' criminal proclivities, the trial court concluded that the evidence presented was sufficient to give rise to a triable issue of fact as to whether Stamford Health was negligent in supervising Mayes. In particular, the trial court noted that DiTeresi's extremely fragile physical and mental condition made her particularly vulnerable to an assault, that Mayes had unfettered and unsupervised access to DiTeresi for up to three full hours, that his access to her included the opportunity to dress, undress and bathe her, and that Stamford Health had no policy that required male certified nurse's assistants attending female patients with dementia to be accompanied by another employee.

[35] The jury also could have concluded that the hospital's ongoing failure to take any such precautions actually emboldened Reardon to continue his abuse of the children who participated in the study.

[36] The hospital's failure to challenge the sufficiency of the evidence on appeal is somewhat perplexing in view of the fact that its claim of instructional impropriety is predicated on its contention that proof of actual or constructive knowledge of propensity—proof that is missing in the present case—*always* is required in cases such as this one because, the hospital maintains, without that proof, the evidence *necessarily* will be inadequate to establish that the third party's criminal misconduct was foreseeable. Nevertheless, for purposes of this appeal, the hospital relies solely on its claim of instructional impropriety and does not challenge the sufficiency of the evidence on foreseeability or any other element of the plaintiff's claim. We reiterate that we express no opinion on that or any other issue that the hospital has not raised on appeal.

[37] Critical to the dissenting justice's contrary conclusion that the trial court improperly rejected the hospital's requested notice of propensity instruction is his reliance on the purported difference between a negligent supervision claim, which, according to the dissenting justice, invariably requires proof of notice of propensity, and a general negligence claim, which does not. We reject as nonexistent the categorical distinction on which the dissent is founded. It is axiomatic that a claim against an employer, including a claim like the present one, alleging that the employer failed to take reasonable precautions to prevent the criminal misconduct of an employee, is a negligence claim, the touchstone of which, as in all negligence actions, is the foreseeability of the harm, or harm of the same general nature, that occurred. Thus, whether the injured party seeks to prove his or her claim against the employer on the basis of notice of propensity evidence or otherwise, the issue is precisely the same: Were the employee's misconduct and the resulting harm foreseeable? Contrary to the contention of the dissenting justice, therefore, § 302 B of the Restatement (Second) of Torts does not establish a "foreseeability standard" that is "very different" from the standard of foreseeability applicable to general negligence claims. That standard does not differ from negligence case to negligence case, and there is no difference in the nature of that test for purposes of a general negligence claim, on the one hand, and a claim under § 302 B, on the other. What differs, rather, is the nature of the *proof* necessary to establish foreseeability. Like all negligence claims, § 302 B is predicated on the same general principles that govern other negligence actions, with liability in such cases depending on the foreseeability of the third party's criminal misconduct. Although the criminal misconduct of a third party ordinarily will not be foreseeable in the absence of proof of notice of propensity, the foreseeability of such misconduct will not always or necessarily depend on such proof; rather, as we explained, the criminal misconduct of a third party may be foreseeable in light of the facts and circumstances of the particular case.

The dissenting justice nevertheless asserts that § 302 B cannot be based on general negligence principles because a third party's criminal misconduct ordinarily is not foreseeable unless the defendant knew or should have known of that third party's propensity to engage in such conduct. Once again, the dissenting justice is incorrect. The fact that such misconduct usually is not foreseeable in the absence of notice of propensity has nothing to do with whether § 302 B is founded on general negligence principles, which, of course, it is. In fact, comment (f) to § 302 B expressly provides that, although "[i]t is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal conduct . . . [*a*]*s in other cases of negligence* (see §§ 291–293 [of the Restatement (Second) of Torts, setting forth factors to be considered in the determination of the standard of reasonable conduct for negligence actions]), it is a matter

of balancing the magnitude of the risk against the utility of the actor's conduct." (Emphasis added.) 2 Restatement (Second), supra, § 302 B, comment (f), p. 93. Moreover, as the dissenting justice acknowledges, the "jury in this case found the evidence sufficient . . . to support a finding of general negligence," a finding that was predicated on the jurors' review of the evidence in light of the trial court's instruction that it could find the hospital liable for Reardon's misconduct *only* if the plaintiff proved that the conduct was *a foreseeable consequence* of the manner in which the growth study was conducted. Although the jury might have benefited from a more detailed instruction, one that included, for example, a recitation of the factors set forth in comment (f) to § 302 B, *neither party requested such a charge*, and, therefore, the court's failure to give it is not an issue in this appeal.

Similarly flawed is the dissenting justice's closely related contention that, "[t]he plaintiff's attempt to disguise the true nature of [the] claim [set forth in the first count of his complaint] by arguing that it simply is a matter of supervision of research relies on a fiction, namely, that, by framing the issue without reference to the researcher, i.e., the *employee*, the plaintiff can escape the more stringent requirements of proof that we historically have applied when a plaintiff seeks to impose liability on a party for its failure to control the conduct of a third person." (Emphasis in original.) Footnote 5 of the dissenting opinion. On the contrary, it is the dissenting justice who relies on a fiction, namely, the purported distinction between the hospital's *supervision of an employee conducting research* and the hospital's *supervision of research conducted by an employee*. Quite clearly, these activities are one and the same; the difference is merely one of semantics.

Two faulty premises provide the foundation for this wholly illusory distinction. The first such premise is that all negligent supervision claims must be brought under § 317 rather than § 302 B of the Restatement (Second) of Torts. The dissenting justice has identified no logical reason why the plaintiff was required to bring his claim under § 317—and we know of none—except to say that permitting the claim to be brought under § 302 B would allow the plaintiff to "circumvent" the rule requiring proof of knowledge of propensity in all § 317 claims. Footnote 5 of the dissenting opinion. But this premise also is flawed. Under § 317, an employer has a duty to exercise reasonable care to control its employee from intentionally harming others if the employer "knows or should know of the necessity and opportunity for exercising such control." 2 Restatement (Second), supra, § 317 (b) (ii), p. 125. There is nothing in this language—which is the very same language in § 320 (b), the provision of the Restatement (Second) on which the second count of the plaintiff's complaint is predicated—to suggest that the liability of an employer under § 317 is conditioned on proof that the employer had actual or constructive knowledge *of the employee's propensity to engage in criminal misconduct*. Rather, § 317 is cast in broader terms, requiring proof that the employer knew or should have known of the *need to exercise control over its employee*. See id. If the drafters of § 317 had intended to limit recovery only to those cases in which the evidence established that the employer had actual or constructive knowledge of its employee's criminal propensity, they would have used such language instead of the more encompassing language that they did use. Although it is true that the great majority of claims under § 317, like the great majority of claims under § 302 B, will fail in the absence of proof of actual or constructive knowledge of propensity, that is not because such proof is required in all cases but merely because, in most cases, the facts otherwise will be insufficient to place the employer on notice of the necessity of "exercis[ing] reasonable care so to control [its employee] . . . as to prevent him from intentionally harming others . . . ." Id., § 317, p. 125. In fact, if the plaintiff in the present case had based his claim on the principles underlying § 317 instead of the principles underlying § 302 B, the jury verdict undoubtedly would have been the same because the jury was persuaded that, in view of the foreseeable risks associated with the growth study, the hospital had breached its duty to exercise reasonable control over Reardon to prevent sexual abuse of the kind that the plaintiff suffered—just as the jury was persuaded that the plaintiff had proven his claim predicated on § 320 under the second count of the complaint.

[38] In support of his contention that the trial court was required to give the requested instruction, the dissenting justice asserts that, even though "the plaintiff neither sought a charge under [§ 302 B of the Restatement (Second) of Torts], nor tried the case under that section, nor raised that section on appeal, the majority latches onto it to uphold the jury verdict and concludes that the jury was entitled to determine whether the hospital was liable under § 302 B." According to the dissenting justice, "the verdict

should be reversed under that theory as well because the [trial court's] charge was . . . insufficient as a matter of law [under § 302 B]." The dissenting justice incorrectly suggests that our reliance on § 302 B is somehow unfair to the hospital. Section 302 B addresses situations, *like the present one*, in which a defendant may be found negligent if the defendant "realizes or should realize that [its conduct] involves an unreasonable risk of harm to another through the [criminal] conduct of . . . a third person . . . ." 2 Restatement (Second), supra, § 302 B, p. 88. Because § 302 B sets forth the established common-law principles on which the first count of the plaintiff's complaint is predicated, we analyze the hospital's claim of instructional impropriety in light of those principles. In other words, we invoke the principles underlying § 302 B only because the hospital's claim implicates those principles. For the reasons set forth in this opinion, the hospital's claim founders on its misapplication of those principles.

In support of his argument that the trial court's charge "was insufficient as a matter of law" under § 302 B, the dissenting justice asserts that the "comments to § 302 B of the Restatement (Second) articulate a foreseeability test indicating that an actor must have knowledge of the third party's attributes or propensities in order to anticipate that the actor's own conduct will create the risk of harm to another [because of] the third party's criminal misconduct." Text accompanying footnote 19 of the dissenting opinion. The dissenting justice also asserts that "it seems entirely clear . . . that, in order to subject an actor to liability for the criminal misconduct of a third party under § 302 B, a jury must be instructed to consider whether the actor has actual or constructive knowledge, or some type of explicit realization, awareness or recognition, that his conduct is highly likely to create a risk of harm by the third party, whose known character, past conduct and tendencies suggest that he or she is likely to engage in the criminal misconduct at issue." Although this assertion is consistent with the dissenting justice's premise that proof of knowledge of propensity is an absolute prerequisite for all negligent supervision claims involving third party misconduct, it is not consistent with the Restatement (Second) itself. In fact, as we have explained, comment (f) to § 302 B identifies the following nonexclusive "[f]actors to be considered" in determining whether a defendant "is required to take precautions against" misconduct: "the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take." 2 Restatement (Second), supra, § 302 B, comment (f), p. 93. This comment makes it perfectly clear that the perpetrator's known criminal propensity is but *one of a number of factors* to be considered in determining whether there is "recognizable high degree of risk of harm" against which the defendant has a duty to protect. Id., comment (e), p. 90. Because the hospital's requested instruction treats proof of knowledge of propensity as the *only* relevant consideration, that instruction cannot be squared with the multi-factored analysis required under comment (f). Only by disregarding the other relevant factors can the dissenting justice assert that the hospital's requested instruction was proper. The dissenting justice therefore is incorrect that the requested instruction represents a fair and accurate statement of the law under § 302 B.

Furthermore, insofar as the dissenting justice maintains that the trial court should have given the jury a more complete instruction under § 302 B, in particular, an instruction that sets forth with specificity the nonexclusive factors to be considered under comment (f) to § 302 B, the simple answer to that contention is that the hospital never sought any such instruction in the trial court, and it raises no such claim on appeal. It is axiomatic that, in such circumstances, this court will not consider the issue because it is not our province to relitigate the case for the benefit of any party. Finally, contrary to the dissenting justice's assertion, the instruction that the trial court *did* give the jury, namely, that the jury was required to decide whether, upon consideration of "all of the circumstances which were known or should have been known to the [hospital] at the time of the conduct in question . . . a reasonably prudent person in the [hospital's] position . . . would anticipate that harm of the same general nature as that which occurred was likely to result," *is a correct statement of the law that the hospital has never challenged*. The instruction that the hospital seeks, requiring proof of notice of propensity, in contrast, is *not* a correct statement of the law because it would have foreclosed the plaintiff from establishing foreseeabil-

ity on the basis of other evidence that, according to the plaintiff, was sufficient to demonstrate that the hospital should have anticipated Reardon's misconduct.

[39] The dissenting justice asserts that, "[c]onsistent with [his view of] § 317, at least thirty-five other jurisdictions that have considered a claim of negligent supervision arising from an employee's intentional or criminal misconduct have required proof that the employer knew or should have known of the employee's propensity to engage in the type of misconduct at issue." Text accompanying footnote 9 of the dissenting opinion. The dissenting justice is incorrect. A review of the cases involving §§ 302 B and 317 on which the dissenting justice relies to support his contention that proof of knowledge of propensity is an absolute requirement for negligent supervision claims involving the criminal or intentional misconduct of an employee or other person reveals that, in those cases, there was either no claim that the nonpropensity evidence was sufficient to support a finding that the criminal misconduct was foreseeable or, contrary to the claim of the injured victim, the nonpropensity evidence was insufficient as a matter of law to permit such a finding. Thus, in none of those cases did the court consider the issue of whether, as the hospital and dissenting justice claim, a third party's criminal misconduct is unforeseeable as a matter of law, no matter what the particular facts and circumstances of the case, in the absence of a showing that the defendant knew or should have known of the third party's propensity to engage in such conduct. Consequently, those cases have no bearing on the proper resolution of the present case, in which the plaintiff's evidence on the foreseeability of Reardon's misconduct has not been challenged on sufficiency grounds.

In fact, as we explained, courts of this state have recognized that proof of knowledge of propensity is *not* a prerequisite to recovery when the evidence is otherwise sufficient to establish the foreseeability of the criminal misconduct; see footnote 34 of this opinion and accompanying text; and courts in other jurisdictions are in accord. For example, in *Nelson* v. *Gillette*, 571 N.W.2d 332 (N.D. 1997), the plaintiff, Twila Nelson, brought an action alleging, inter alia, that the defendant Kidder County was liable for the negligent supervision of its employee, Vince Gillette, a licensed social worker, who, according to Nelson, had sexually abused her during counseling sessions when Nelson was a ward of the county in foster care and was approximately sixteen years old. Id., 333–34. The trial court granted the defendant's motion for summary judgment because there was no evidence that Gillette had a prior history of misconduct and no indication that Gillette's supervisors knew about or suspected the sexual abuse or predisposition for such abuse. See id., 334, 340. On appeal, Nelson asserted that her claim gave rise to a triable issue of fact with respect to the foreseeability of Gillette's misconduct because the defendant knew that she was a sexually promiscuous child but had taken no measures to reasonably protect her from sexual exploitation while in foster care. Id., 340. Applying § 317 of the Restatement (Second); see id., 340–41; the Supreme Court of North Dakota agreed with Nelson, explaining that, "[b]ecause of the known risk of sexual activity present in the unequal power relationship of counseling between a social worker and child-ward, the potential of sexual contact between a male counselor and a female child-client raises questions of fact." Id., 342; see also id., 341 (if believed, evidence was sufficient to "justify a jury in finding . . . [that] the [defendant] should have known of the need and opportunity for exercising control to protect [Nelson]" from sexual abuse by Gillette). Thus, in *Nelson*, the court expressly held that the issue of whether the defendant should have anticipated and guarded against Gillette's sexual abuse of Nelson was a question of fact to be decided by the jury in light of all the relevant facts and circumstances even though Gillette concededly had no known propensity to engage in such conduct. Id., 342. The Supreme Court of North Dakota recently cited the well reasoned decision in *Nelson* with approval in *Richard* v. *Washburn Public Schools*, 809 N.W.2d 288, 297 (N.D. 2011), which, contrary to the assertion of the dissenting justice, casts not the slightest doubt on *Nelson* and contains not the slightest suggestion that, for purposes of a claim under § 317, the foreseeability of the employee's criminal misconduct can be established only by proof of knowledge of propensity.

Similarly, in *Kirlin* v. *Halverson*, 758 N.W.2d 436 (S.D. 2008), the Supreme Court of South Dakota concluded that, under § 317, the named plaintiff, James Scott Kirlin, was entitled to a jury determination on his negligent supervision claim despite the lack of notice of propensity evidence. See id., 451. Kirlin, who was employed by Carrier Commercial Services (Carrier)

to perform heating, ventilating and air conditioning (HVAC) services, was working at the Empire Mall (mall) in Sioux Falls, South Dakota, where employees of another company, PKJ, Inc. (PKJ), a competitor of Carrier, were performing similar services in close proximity to Kirlin. See id., 442–43. Carrier recently had been awarded a contract to replace PKJ as the primary HVAC service provider at the mall, and PKJ employees were resentful of this change. See id., 442. One of PKJ's co-owners, Kelly Cawthorne, confronted Kirlin and yelled obscenities at him, and refused to shake Kirlin's hand when Kirlin tried to defuse the situation, which apparently was exacerbated by the fact that Kirlin had been given permission by the mall's operations manager to use certain air conditioning filters that previously had been provided by PKJ. Id. The next day, Kirlin, who was carrying several of those filters, was physically attacked by a PKJ employee, Kim Halverson, and suffered injuries from that assault. Id., 442–43. Kirlin brought an action against PKJ, among others, alleging that PKJ had been negligent in failing to take reasonable precautions to prevent the assault by Halverson. See id., 441, 443. On appeal, the Supreme Court of South Dakota reversed in part the judgment rendered in favor of PKJ; id., 455; concluding that a jury reasonably could find that the assault was foreseeable in light of the circumstances leading up to Halverson's assault against Kirlin, even though the court indicated that Halverson's prior conduct did not support a finding that he was a person with dangerous propensities. See id., 451, 453–54 n.14. Thus, *Kirlin*, like *Nelson*, belies the dissenting justice's claim that knowledge of propensity is invariably a prerequisite to recovery on a negligent supervision claim under § 317 of the Restatement (Second) of Torts.

[40] The dissenting justice argues that the plaintiff and the trial court actually *agreed* with the hospital that the plaintiff was required to prove that the hospital knew or should have known of Reardon's propensity to sexually abuse children and, further, that the plaintiff contends for the first time on appeal that no such proof was necessary. Specifically, the dissenting justice states that the parties and the trial court "all viewed count one of the plaintiff's complaint as a . . . claim in which a key component of the plaintiff's proof would be whether the hospital knew or should have known of Reardon's propensity to sexually abuse children," and that, on appeal, "the plaintiff argues for the first time that . . . no charge on notice [of propensity] was necessary and, therefore, the charge given was correct." To support his assertion, the dissenting justice identifies a number of statements that the trial court and the parties made over the course of the litigation of the case that, when removed from their context, are claimed to substantiate his conclusion. The dissenting justice's argument—which in reality is a claim that the plaintiff has waived his right to contest the hospital's argument that notice of propensity was a necessary element of the plaintiff's proof, a claim that the hospital itself has not made—is demonstrably incorrect.

With respect to the dissenting justice's assertion that the plaintiff had agreed that proof of notice of propensity was required, the fact that there was no such agreement is apparent throughout the record of the trial court proceedings and is clearly reflected, among other places in that record, in the plaintiff's memorandum in support of his objection to the hospital's motion for a directed verdict. In that memorandum, after explaining why the evidence was sufficient to find the hospital liable in the absence of propensity evidence, the plaintiff expressly states: "The [hospital] contends that the plaintiff must show actual or constructive notice of sexual abuse in order to sustain a claim for negligence. . . . This allegation is wrong out of the starting gate because 'notice' that [Reardon was] actually engaged in wrongdoing is not a required element of the negligence at issue here . . . ." (Citation omitted.) If this was not clear enough, the plaintiff's request to charge on the issue of notice, in which the plaintiff sought a jury instruction that the foreseeability of Reardon's conduct was to be evaluated in light of the unsafe or dangerous conditions under which the growth study was conducted, also establishes that the plaintiff never conceded that propensity evidence was a necessary prerequisite to liability. The hospital's memoranda in support of its motion for a directed verdict likewise demonstrate that the plaintiff did not agree that propensity evidence was required. In those memoranda, the hospital argues at length that it was entitled to a directed verdict because of the absence of proof that the hospital knew or should have known of Reardon's propensity for pedophilia, but nowhere in its submission does the hospital even suggest that the plaintiff had conceded that he was required to establish that the hospital knew or should have known of Reardon's pedophilia. If there had been an agreement by the plaintiff on the need for propensity evidence, or even if the hospital believed

that the plaintiff had agreed that such evidence was necessary, the hospital undoubtedly would have raised the issue in the trial court, but it never did so. Furthermore, the very fact that the trial court rejected the hospital's request to charge on the requirement of proof of actual or constructive knowledge of propensity, and then also rejected the hospital's contention that the absence of propensity evidence entitled it to a directed verdict, contradicts any claim that the court itself believed that there was an unstated agreement that such proof was required. In sum, the dissenting justice's contention that the parties and the court agreed that proof of knowledge of propensity was a necessary element of the plaintiff's case is belied by the record, not supported by it. For the same reasons, the dissenting justice also incorrectly asserts that the plaintiff failed to preserve his claim challenging the propriety of the hospital's requested propensity instruction. On the contrary, the record plainly reveals that the plaintiff took the very same position in the trial court with respect to that issue that he maintains on appeal.

We note, finally, that the plaintiff's request to charge on notice speaks in terms of the hospital's actual or constructive knowledge of Reardon's sexual abuse of the plaintiff, *not* in terms of its actual or constructive knowledge of Reardon's propensity to sexually abuse children, as the dissenting justice asserts. In fact, the plaintiff's request to charge contains no reference whatsoever to propensity, proclivity, tendency or any other similar term. Rather, the plaintiff's requested instruction on notice reflects the theory of liability that the plaintiff consistently asserted throughout the course of the litigation, namely, that the hospital negligently failed to take reasonable precautions to monitor and supervise the growth study. See footnote 12 of this opinion. Thus, the plaintiff's proposed notice instruction provides that the hospital must be deemed to have constructive knowledge of Reardon's misconduct "if [it] failed to make reasonable inspection which would have disclosed the dangerous condition . . . . Reasonable supervision requires reasonable inspection and oversight. If you find that [the hospital] failed to reasonably supervise . . . Reardon and failed to reasonably inspect and oversee his activities, then it is liable for all harms proximately caused by the failure to supervise or inspect.

"You may consider whether the [hospital] took precautions on a reasonable basis or in a reasonable way to protect children from the unsafe condition posed by Reardon's continued access to children. You may consider the length of time the condition had existed in determining whether the [hospital] should have known of the condition had the [hospital] used reasonable care." This requested instruction mirrors the plaintiff's request to charge on standard of care, which provides in relevant part: "The duty of exercising [the requisite] degree of care, skill and diligence attaches to the hospital at the time the growth study commences. The hospital's negligence in overseeing the growth study is to be determined by reference to the pertinent facts existing at the time of the rendition of medical care and treatment, or [the] subjecting of the plaintiff to the growth study, of which the hospital through its agents or employees knew, or in the exercise of due care should have known. It may consist of the failure to apply the proper caution and techniques when supervising the study, or it may precede that and result from a failure to properly appreciate the existing conditions of the growth study. The fact that the hospital may claim to have acted to the best of [its] ability will not avoid legal liability for damages resulting from substandard oversight." Consequently, insofar as the dissenting justice relies on the plaintiff's references to constructive knowledge—in his requests to charge or elsewhere—to support the view that the plaintiff conceded that he was required to prove actual or constructive knowledge of Reardon's propensity to sexually abuse children, that reliance is misplaced. On the contrary, the two completely different theories of notice as set forth in the parties' requests to charge reflect the parties' opposing positions on the fundamental issue of the foreseeability of Reardon's misconduct.

[41] The dissenting justice maintains that we have employed an improper standard of review. Contrary to the dissenting justice's assertion, we have applied the well established standard of review for claims of instructional impropriety and concluded that the hospital's requested instruction was incorrect as a matter of law. See, e.g., *Archambault* v. *Soneco/Northeastern, Inc.*, 287 Conn. 20, 42, 946 A.2d 839 (2008) ("[T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions

as improper." [Internal quotation marks omitted.]). We have reviewed the facts adduced at trial only to demonstrate that the requested instruction was an incorrect statement of the law in light of those facts. As we explained, that instruction would have been improper because, if it had been given, the jury would have been foreclosed from finding a breach of duty by the hospital—there being no evidence that the hospital knew or had reason to know of Reardon's propensity for pedophilia—despite the plaintiff's reliance on other evidence of such a breach under the principles set forth in § 302 B of the Restatement (Second) of Torts.

[42] In its initial request to charge, the hospital requested that the trial court instruct the jury that "[t]he plaintiff must prove by the testimony of an expert qualified to state what the particular standard of care was, and by a fair preponderance of the evidence, what the particular standard of care required under the circumstances of this case. You may not judge this issue according to the standard of care that might apply today. You may find that [the hospital] was negligent only if you find that it failed to meet the standard of care that was applicable to similarly situated hospitals during the relevant [time] period, that is, from 1969 to 1972." In a supplemental request to charge, the hospital further requested that the trial court instruct the jury with respect to the plaintiff's corporate negligence claim in relevant part: "To find that the plaintiff has carried his burden of demonstrating what the applicable standard of care was at the relevant time in this case, and that the [hospital] breached that standard of care, you must find that the plaintiff has introduced expert testimony showing both what the applicable standard of care was, and that the [hospital] breached the standard of care.

* * *

"*Hospital bylaws, including the bylaws of the medical staff that the plaintiff put into evidence, do not themselves establish the standard of care.*" (Emphasis added.)

The trial court denied these requests. After the trial court instructed the jury, the hospital excepted to the court's failure to charge the jury in accordance with its requested standard of care and bylaws instructions. On appeal, the hospital's claim of instructional impropriety is limited to the trial court's failure to instruct the jury that the bylaws themselves do not establish the standard of care.

[43] The present case also is distinguishable from other corporate negligent cases involving a hospital's alleged breach of the standard of care because, as we explain more fully hereinafter; see footnote 45 of this opinion; the trial court in the present case did not require proof of the standard of care applicable to similarly situated hospitals, a ruling from which the hospital has not appealed.

[44] The dissenting justice argues that Shorr "did not state that the hospital's bylaws coincided with or were consistent with the legally applicable standard of care in the relevant community, nor did he connect the bylaws, by implication or otherwise, with that standard." This assertion is incorrect. On direct examination, the plaintiff's counsel asked Shorr what the term "standard of care mean[s]?" Shorr responded: "Standard of care or the synonym for that community standard is the minimally accepted behavior or action that is expected of personnel and hospitals discharging their duties and responsibilities, whether they're medical, clinical or administrative." The plaintiff's counsel then asked Shorr whether there was a standard of care applicable to a hospital's supervision of research and where it came from. Shorr responded that there was such a standard of care, and that "[i]t comes from their own bylaws." The plaintiff's counsel thereafter requested that Shorr describe the standard of care governing the present case, which he did in some detail. Contrary to the dissenting justice's contention, therefore, it is abundantly clear that Shorr understood the meaning of the term "standard of care" and connected the hospital's bylaws to that standard. Even if Shorr may have been wrong about the standard of care or its origins, because the hospital has not challenged the propriety of Shorr's testimony or the sufficiency of the evidence as to the applicable standard of care, we do not consider those issues.

[45] It bears emphasis that the hospital makes no claim on appeal that Shorr's testimony was improper or otherwise inadmissible. We note, however, that the hospital did raise the claim in the trial court that the present case is a corporate negligence case requiring expert testimony on the standard of care applicable to all similarly situated hospitals. "Under Connecticut law, to sustain a corporate negligence claim against a hospital, a plaintiff is generally required to establish, through expert testimony, the standard of care to which [the] defendant [is] to be held and a violation of the standard.

. . . Specifically, the plaintiff is required to produce expert testimony of the standard of care applicable to similar hospitals similarly located . . . and expert testimony that the hospital's conduct did not measure up to that standard." (Citation omitted; internal quotation marks omitted.) *Neff* v. *Johnson Memorial Hospital*, 93 Conn. App. 534, 543, 889 A.2d 921 (2006). In fact, the hospital moved for a directed verdict and to set aside the verdict on the ground that the plaintiff had failed to sustain his burden under *Neff* in light of Shorr's testimony that he was unaware of the standards and practices of any hospital other than the hospital in the present case. The hospital, however, has not pursued this claim on appeal. Consequently, the issue of whether the present case properly was submitted to the jury as an ordinary negligence case rather than a corporate negligence case requiring expert testimony on the standard of care applicable to similarly situated hospitals is not before us. Moreover, the hospital has not pursued a claim on appeal that Shorr lacked the qualifications to offer an expert opinion on the standard of care applicable to the hospital's supervision of research conducted at the hospital.

[46] The trial court instructed the jury in relevant part: "[W]e've had in this case the testimony of expert witnesses. Expert witnesses such as [Shorr, New, Salter and three other physicians] are people who, because of their training, education and experience, have knowledge beyond that of the ordinary person. Because of that expertise in whatever field they happen to be in, expert witnesses are allowed to give their opinions. Ordinarily, a witness cannot give an opinion about anything but, rather, is limited to testimony as to the facts in that witness' personal knowledge. The experts in this case have given opinions. However, the fact that these witnesses may qualify as experts does not mean that you have to accept their opinions. You can accept their opinions or reject them.

"In making your decision whether to believe an expert's opinion, you should consider: the expert's education, training and experience in the particular field; the information available to the expert, including the facts the expert had, and the documents or other physical evidence available to the expert; the expert's opportunity and ability to examine those things; the expert's ability to recollect the activity and facts that form the basis for the opinion; and the expert's ability to tell you accurately about the fact, activity and the basis for the opinion.

"You should ask yourselves about the methods employed by the expert and the reliability of the result. You should further consider whether the opinions stated by the expert have a rational and reasonable basis in the evidence. Based on all of those things together with your general observations and assessment of the witnesses, it is then up to you to decide whether or not to accept the opinion. You may believe all, some or none of the testimony of an expert witness. In other words, an expert's testimony is subject to your review like that of any other [witness' testimony]."